Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	
Capability to All Americans in a Reasonable	)	
And Timely Fashion, and Possible Steps	)	CC Docket No. 98-146
To Accelerate Such Deployment Pursuant	)	
To Section 706 of the Telecommunications	)	
Act of 1996	)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry[1] in the above-captioned docket. In the Notice of Inquiry, the Commission posed four basic questions: (1) What is "advanced telecommunications capability?" (2) "Is advanced telecommunications capability being deployed to 'all Americans'?" (3) "Is overall deployment 'reasonable and timely'?" and (4) "What actions will accelerate deployment?" U S WEST addresses each of these questions in turn.

[1] See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Notice of Inquiry, FCC 00-57, rel. Feb. 18, 2000 ("Notice of Inquiry").

I. THERE IS NO PRESENT REASON TO CHANGE THE COMMISSION'S PREVIOUS DEFINITION OF "ADVANCED TELECOMMUNICATIONS CAPABILITY"

In the First Report,[2] the Commission defined "advanced telecommunications capability" as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile."[3] The Commission sought comment on this definition in the recent Notice of Inquiry, inquiring whether this definition should be changed, and, if so, how.[4]

U S WEST believes that all of the factors identified by the Commission in the Notice of Inquiry -- specifically, "changes in technology performance, the characteristics of the medium, the cost of providing, or public demand for high-speed services"[5] -- are relevant in determining whether to change the definition of "advanced telecommunications capability." Since the Commission just established this definition last year, however, none of these factors have changed significantly to justify changing the definition at this time.

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[2] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report, 14 FCC Rcd. 2398 (1999) ("First Report").

[3] Id. at 2406 ¶ 20.

[4] See Notice of Inquiry ¶ 9.

[5] Id.

II. ADVANCED TELECOMMUNICATIONS CAPABILITY IS NOT BEING DEPLOYED TO "ALL AMERICANS"

Without a doubt, advanced telecommunications capability is not currently being deployed to all Americans.[6] U S WEST supports the Commission's effort to gather data on the so-called "digital divide," but U S WEST has not yet updated the data previously submitted to the Commission on this issue. U S WEST is presently compiling this information, and will provide it to the Commission when it is available.[7]

III. GIVEN THE IMPORTANCE OF ADVANCED TELECOMMUNICATIONS CAPABILITY, THE COMMISSION SHOULD JUDGE "REASONABLE AND TIMELY" DEPLOYMENT BY A VERY STRINGENT STANDARD

The Commission sought comment on whether the deployment of advanced telecommunications capability has been "reasonably and timely" deployed as compared to other consumer electronic technologies, including telephone, black-and-white television, color television, cellular service, video cassette tape players, compact disc players, direct broadcast satellite service, and radios.[8] The Internet has been described as the most important invention in communications since the

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[6] See, generally, National Telecommunications & Information Administration, Fall Through the Net (July 1999); see also In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 99-204, rel. Sep. 3, 1999 (recognizing that even basic telephone service has not been deployed to all Americans).

[7] Consistent with the comments that U S WEST filed in the Data Gathering Proceeding, U S WEST urges the Commission to treat all carrier-specific information as confidential. See In the Matter of Local Competition and Broadband Reporting, CC Docket No. 99-301, Comments of U S WEST Communications, Inc. to Notice of Proposed Rulemaking, filed Dec. 3, 1999, attached hereto as Exhibit A.

printing press, but to reap the full benefit of the Internet for commerce, education, healthcare, and entertainment, "advanced telecommunications capability" (or broadband) must be deployed for Internet access.[9] Given the importance of such deployment, the Commission should judge whether deployment is "reasonable and timely" by a very high standard. Accordingly, U S WEST suggests that the Commission compare "reasonable and timely" deployment of broadband to the market penetration for radios, which yielded the highest market penetration for the technologies identified in the Notice of Inquiry.[10]

The Commission should also recognize that "reasonable and timely" deployment may also be a function of the reason for any delay in deployment. If advanced services are not being deployed because of regulatory policies that inhibit such deployment, we submit that all delay in deployment is thereby unreasonable. On the other hand, technology and markets often pose very real barriers to advanced services deployment that generally need to run their course. Delay in deployment caused by such limitations is generally not unreasonable.

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[8] See Notice of Inquiry ¶¶ 39-40.

[9] See Remarks by Deborah A. Lathan, Chief, Cable Services Bureau, Before the National Governors' Association on Feb. 27, 2000 (available online at http://www.fcc.gov/Speeches/misc/spdal904.html).

[10] See Notice of Inquiry ¶ 40.

IV. AS OUTLINED IN PREVIOUS PLEADINGS BY U S WEST, THE COMMISSION SHOULD TAKE MEASURES TO ACCELERATE DEPLOYMENT BY REDUCING REGULATION OF THE BROADBAND MARKET

Without belaboring what U S WEST has urged the Commission to do in earlier submissions,[11] U S WEST believes that the Commission should take action to encourage broadband deployment. U S WEST has pointed out in the past that current federal and state regulatory policies impede the deployment of new technologies, particularly to rural or low-income consumers. Policies which inhibit deployment generally are those which seek to encourage development of competition for the most lucrative consumer. These policies often have an unintended side effect of constraining incumbent local exchange carrier ("LEC") investment and service to those customers who are not so profitable to serve. Balance is obviously needed. Among the regulatory policies which have a negative impact on the deployment of advanced services to all Americans are:

- Section 271 of the Act, as it interplays with currently-defined LATA boundaries, inhibits deployment of advanced services to rural areas.[12]

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[11] See In the Matter of Joint Petition of the State of Nebraska and U S WEST Communications, Inc. for Targeted InterLATA Relief, Joint Petition of the State of Nebraska and U S WEST Communications, Inc. for Targeted InterLATA Relief, filed Jan. 15, 1999, attached hereto as Exhibit B; Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition for Relief, filed Feb. 25, 1998, attached hereto as Exhibit C; In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Comments of U S WEST, filed Sep. 14, 1998, attached hereto as Exhibit D, and Reply Comments of U S WEST, filed Oct. 8, 1998, attached hereto as Exhibit E.

[12] See 47 U.S.C. § 271(a).

- Section 251(c)(3) of the Act which, when applied to incumbent LEC investment in advanced services, provides an economic disincentive to making such investment by permitting the incumbent's competitors to leverage off of incumbent LEC investment at below-cost prices.[13]

- Section 251(c)(4) of the Act, which applies to incumbent LEC offerings of advanced services, permits competitors to resell those services at a substantial discount, and deprives the incumbent of the benefit of its investment.[14]

- The payment of reciprocal compensation for traffic bound to Internet Service Providers ("ISP"), which, by giving competitive LECs and ISPs a massive arbitrage vehicle based upon funneling ISP traffic through circuit switches, discourages deployment and development of superior technology.

- Pricing regulation that constrains incumbent LEC development of new technology in even the most competitive markets.

- Regulations which artificially depress the price of more expensive services (in, for example, rural areas) and make it extremely difficult for competitors to provide services.

While there is obviously room for substantial Commission action in the area of encouraging additional advanced services deployment, U S WEST submits that it is equally important that the Commission focus on areas where advanced services

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[13] See 47 U.S.C. § 251(c)(3).

[14] See 47 U.S.C. § 251(c)(4).

deployment can be encouraged by minimizing regulation. Much more needs to be done to deregulate incumbent LEC services.

Respectfully submitted,

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March 20, 2000

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Local Competition and Broadband Reporting	)	CC Docket No. 99-301
	)	

COMMENTS OF U S WEST COMMUNICATIONS, INC. TO NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST") responds to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] In its NPRM, the Commission proposes rules to collect information so that it can accurately assess the development of local service competition and broadband deployment. U S WEST supports the Commission's goal of collecting such information from all industry participants, particularly new entrant, local exchange and broadband competitors. As explained in the NPRM, such information will enable the Commission to promote regulatory forbearance set forth in Section 10 of the Act,[2] and eliminate unnecessary regulation, as contemplated in Section 11 of the Act.[3]

U S WEST urges the Commission to treat all carrier-specific information as confidential, to require that industry participants file surveys on an annual basis,

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[1] In the Matter of Local Competition and Broadband Reporting, CC Docket No. 99-301, Notice of Proposed Rulemaking, FCC 99-283, rel. Oct. 22, 1999 ("NPRM").

[2] 47 U.S.C. § 160.

[3] 47 U.S.C. § 161.

and to sunset the filing requirements after four years.

II. ALL CARRIERS OF SUFFICIENT SIZE SHOULD BE SUBJECT TO MANDATORY REPORTING REQUIREMENTS

U S WEST concurs with the Commission's tentative conclusion that the Commission should receive local competition data from competitive local exchange carriers ("CLECS") as well as from incumbent local exchange carriers ("ILECS"). Such a requirement is the only means by which the Commission can evaluate accurately true market conditions.

Such accurate information is necessary, for example, so that the Commission can accurately assess forbearance petitions of ILECS pursuant to Section 10 of the Act. In particular, pursuant to the framework outlined in the Dominant/Non-Dominant Order,[4] the Commission will determine whether a carrier is dominant by, among other things, identifying the firms that are current or potential suppliers in that market. As the Commission recently confirmed in its most recent forbearance order, "[c]entral to this inquiry is reliable market data concerning competitive market conditions for the service or services at issue."[5] Rather than relying on market surveys or ILEC "best estimates," the collection of actual information from CLECs regarding their service offerings will allow the Commission to assess

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[4] In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756 (1997) ("Dominant/Non-Dominant Order"); on recon. 12 FCC Rcd. 8730 (1997).

[5] Petition of U S WEST Communications, Inc. For Forbearance from Regulations as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157, Memorandum Opinion and Order, FCC 99-365, rel. Nov. 22, 1999 ¶ 20.

appropriate regulatory forbearance pursuant to Section 10 of the Act with "reliable market data."

Such information will also allow the Commission additional accurate information when reexamining its list of network elements that are subject to the unbundling obligations of the Act.[6]

U S WEST nonetheless urges the Commission to lower the proposed threshold for the reporting requirement in order to obtain data regarding developments in rural areas. The current proposal, which would require carriers with 50,000 or more local access lines or channels (of any capacity) nationwide, or 50,000 or more subscribers nationwide to file such information, could very well result in a failure by the Commission to capture local or regional competitors who provide local competition in relatively rural states. The provisioning of service to 10,000 local access lines in many of the rural states in U S WEST's region, for example, would identify the onset of robust local competition within that state. U S WEST therefore proposes that the Commission add to its reporting threshold all carriers with 10,000 or more local access lines or channels (of any capacity) within any one state, or 10,000 or more subscribers within any one state.

U S WEST further submits that local competition and broadband information provided by wireline carriers should be further grouped into metropolitan statistical

[6] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, rel. Nov. 5, 1999 ¶ 151.

areas ("MSA")/non-MSA data for each state[7]. Such a breakdown would not be as cumbersome as capturing the data by wire center or zip code, but would allow the Commission to compare the level of local competition and broadband deployment in urban versus rural areas.

III. LOCAL COMPETITION REPORTING SHOULD BE CONFIDENTIAL

U S WEST supports the Commission's tentative conclusion that it should receive local competition data from CLECs as well as ILECs, regardless of whether they utilize wireline or wireless technologies to provide local service.[8] However, U S WEST submits that the data should be treated as confidential. The detailed information included in the Survey is not typically available among competitive companies -- nor should it be made public given the emerging competitive telecommunications environment.

Local telecommunications markets are becoming increasingly competitive. Product and sales information by geographic location provides line of business data that can give competitors valuable insights into a company's specific activities and business strategies. By observing this data over time, competitors can gain insights into where its competitors are focusing investment. Access to a telecommunications company's customer information gives competitors and potential competitors an unfair advantage by allowing them to target that company's customers.

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[7] This type of breakdown would be similar to what is currently provided by ILECs in the ARMIS 43-05 reports.

[8] NPRM ¶ 26.

The local competition and broadband data have value on their own, but when coupled with ARMIS[9] data, publication of information set forth in the NPRM places an ILEC such as U S WEST at a competitive disadvantage when compared to its competitors and potential competitors. Only U S WEST and the other largest ILECs are required to file detailed financial and other information annually in ARMIS reports.

The Commission should therefore treat as confidential any company-specific data. U S WEST believes that publishing aggregate data by state will meet the Commission's objective and allow the information to be analyzed in light of the goals of Sections 10 and 11 of the Act. By masking the detail of company-specific data, the Commission will allow the market to develop in a truly competitive manner without disadvantaging companies already in the market.

If the Commission does not agree to treat the entire report as confidential then, at a minimum, sections IV, V, and VI of the survey should be afforded confidential treatment.[10] In the prior voluntary surveys filed by U S WEST, for example, information relating to broadband was treated as confidential because of the highly competitive nature of the service.

The survey outlined in the NPRM, moreover, has been expanded to include data on mobile telephony service. Again, because of the highly competitive nature

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[9] Automated Management Reporting Information System ("ARMIS").

[10] NPRM at Attachment A, FCC Form 477, Section IV -- Number of One-Way and Full Broadband Lines/Channels connected to All End User Customers, Section V -- Number of One-Way and Full Broadband Lines/Channels connected to Residential Customers, Section VI -- Mobile Service Total Subscribers.

of this service, U S WEST would propose that it be filed on a confidential basis. The Commission would still be able to access the confidential data to prepare its annual report on local competition. U S WEST suggests that the Commission in its annual report should publish aggregated data by State, so as not to identify individual carrier market share. This would still serve the Commission's objective of evaluating the development of competitive alternatives to ILEC offerings.

IV. LOCAL COMPETITION REPORTING SHOULD BE DONE ON AN ANNUAL BASIS

In determining the frequency of this data collection, the Commission should consider whether quarterly changes are significant enough to cause the Commission to make a change in policy decisions.

The Commission has announced its intention to issue reports similar to its Local Competition Report each calendar year. If reports will be issued only once a year, there is no need to collect data more frequently. Additional reporting burdens carriers that must gather, analyze, validate, and report the data.

V. THE SURVEY SHOULD SUNSET AFTER FOUR YEARS

U S WEST supports the Commission's premise that the purpose of the "information collection program [is] not to impose a 'permanent' regulatory burden on carriers and others."[11] The Commission seeks comment on whether the program should sunset after five years with a review process every three years. Since the survey has been collected on a voluntary basis for more than one year already, U S WEST submits that the report should sunset after four years, with a review

[11] NPRM ¶ 83.

period after two years. The two year review period is consistent with Section 11 of the Act.[12]

VI. CONCLUSION

U S WEST supports the Commission's goal of collecting information relating to local service competition and broadband deployment from all industry participants. As explained in the NPRM, such information will enable the Commission to promote regulatory forbearance set forth in Section 10 of the Act, and eliminate unnecessary regulation, as contemplated in Section 11 of the Act.

U S WEST urges the Commission to treat company-specific information as confidential, to require that industry participants file surveys on an annual basis, and to sunset the filing requirements after four years.

Respectfully submitted,

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December 3, 1999

[12] 47 U.S.C. § 161.

CERTIFICATE OF SERVICE

I, Kristi Jones, do hereby certify that I have caused 1) the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC. TO NOTICE OF PROPOSED RULEMAKING** to be filed electronically with the FCC by using its Electronic Comment Filing System, and 2) a courtesy copy of the **COMMENTS** to be served, via hand delivery, upon the persons listed on the attached service list.

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December 3, 1999

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EXHIBIT B

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File No.....Initials.....
Proceeding...Section 706.....
Assigned To....Scott.....

1-15-99

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Joint Petition of the State of Nebraska and U S WEST Communications, Inc. for Targeted InterLATA Relief	)	File No. _____
	)	

JOINT PETITION OF THE STATE OF NEBRASKA AND U S WEST COMMUNICATIONS, INC. FOR TARGETED INTERLATA RELIEF

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January 15, 1999

SUMMARY

Citizens living in rural communities in the northeastern corner of Nebraska are denied access to a broad array of state government services that are readily available throughout the rest of the State — simply because they live on the wrong side of a LATA boundary. The scarcity of interLATA data transport facilities in northeastern Nebraska and the resulting high service costs make it impossible for the State to purchase the high-capacity links it needs to bridge this gap. U S WEST operates a high-capacity frame-relay network on both sides of the LATA boundary that separates the northeastern region from the rest of the State and has access to transport facilities that would enable it affordably to carry data traffic across the boundary. But U S WEST currently may not provide this service because of the interLATA restriction applicable to Bell operating companies.

Therefore, the State of Nebraska and U S WEST jointly petition the Commission for targeted interLATA relief in the form of a limited-purpose, customer-specific modification of the boundary between the Omaha, Nebraska and Sioux City, Iowa LATAs. Petitioners propose modifying the boundary to permit U S WEST to connect remote sites located in the Sioux City LATA with the State's network facilities located in the Omaha LATA. The modification would be limited to packet-switched data traffic and private line video and other data transport. Petitioners seek the Commission's approval for this modification pursuant to section 3(25) of the Communications Act and section 706 of the Telecommunications Act of 1996.

The Commission approves LATA boundary modifications when the benefits to the community from the modification outweigh the risks of anticompetitive behavior by the BOC seeking the change. Petitioners easily satisfy that standard here. The existing LATA boundary effectively prevents the State from deploying high-speed data applications, such as

videoconferencing and distance learning, to the small towns and Native American reservations of northeastern Nebraska. Permitting U S WEST to use its facilities to carry traffic for the State's data communications network will make it possible for the State to provide advanced telecommunications and better public services to these communities. At the same time, because the proposed boundary modification will be limited to high-speed data applications for a single customer using a single network, it poses no threat to competition; the relief requested is not a substitute for complete interLATA relief under section 271. Indeed, because existing competitors have proven unwilling or unable to provide the needed capacity on affordable terms, allowing U S WEST into the market to provide this service will increase competition, not stifle it.

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	)	

JOINT PETITION OF THE STATE OF NEBRASKA AND U S WEST COMMUNICATIONS, INC. FOR TARGETED INTERLATA RELIEF

Citizens living in rural communities in the northeastern corner of Nebraska are denied access to a broad array of state government services that are readily available throughout the rest of the State — simply because they live on the wrong side of a LATA boundary. The scarcity of interLATA data transport facilities in northeastern Nebraska and the resulting high service costs make it impossible for the State to purchase the high-capacity links it needs to bridge this gap. U S WEST Communications, Inc. ("U S WEST") operates a high-capacity frame-relay network on both sides of the LATA boundary that separates the northeastern region from the rest of the State and has access to transport facilities that would enable it affordably to carry data traffic across the boundary. But U S WEST currently may not provide this service because of the interLATA restriction applicable to Bell operating companies.

Therefore, the State of Nebraska and U S WEST jointly petition the Commission for targeted interLATA relief in the form of a limited-purpose, customer-specific modification of the boundary between the Omaha, Nebraska (644) and Sioux

City, Iowa (630) LATAs.[1] Petitioners propose modifying the boundary to permit U S WEST to connect remote sites located in the Sioux City LATA with the State's network facilities located in the Omaha LATA. The modification would be limited to packet-switched data traffic and private line video and other data transport. Petitioners seek the Commission's approval for this modification pursuant to section 3(25) of the Communications Act, 47 U.S.C. § 153(25), and section 706 of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. 104-104, § 706(a), 110 Stat. 153 (1996) (codified at 47 U.S.C. § 157 nt.).

The bandwidth deficit in northeastern Nebraska is symptomatic of the difficulty many rural areas have encountered in attempting to obtain access to advanced telecommunications and information services. The Commission has recognized this problem and pledged to explore various means of responding to it, including the possibility of using its authority to modify LATA boundaries.[2] In fact, Chairman Kennard recently made it a top priority for the Commission "to ensure that all Americans become full participants in the richness of the Information Age."[3] In past proceedings, the Commission has approved numerous LATA boundary modifications, concluding that the benefits to the community from the modification outweighed the risks of

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[1] As the attached maps illustrate (*see* Tab B), the Sioux City, Iowa LATA extends into northeastern Nebraska.

[2] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, CC Docket Nos. 98-147 et al., ¶¶ 190-96 (1998) ("*Advanced Services Order*" or "*Advanced Services NPRM*").

[3] *See Chairman Kennard's Agenda for 1999* (available at www.fcc.gov/ Speeches/ Kennard/Statements/stwek901.html)

anticompetitive behavior by the BOC seeking the change.[4] Petitioners' proposed modification easily satisfies that test. The existing LATA boundary effectively prevents the State from deploying high-speed data applications, such as videoconferencing and distance learning, to the small towns and Native American reservations of northeastern Nebraska. Permitting U S WEST to use its facilities to carry traffic for the State's data communications network will make it possible for the State to provide advanced telecommunications and better public services to these communities. At the same time, because the proposed boundary modification will be limited to high-speed data applications for a single customer using a single network, it poses no threat to competition; the relief requested is not a substitute for complete interLATA relief under section 271. In addition, U S WEST is proposing to offer the State a service that existing competitors have proven unwilling or unable to provide on affordable terms. Allowing U S WEST into the market to provide this service will increase competition, not stifle it.

BACKGROUND

The State of Nebraska, through the Division of Communications of the Department of Administrative Services, operates a high-speed data network (the "State Network") that connects various government agencies (State, county, and local), educational institutions, and Native American reservations across Nebraska. The connections between sites in the northeastern part of the State are less robust than those

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[4] *Petitions for Limited Modification of LATA Boundaries To Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, 12 FCC Rcd. 10646 ¶ 17 (1997) ("*ELCS Order*"); *see also Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries To Provide Integrated Services Digital Network (ISDN) at Hearne, Texas*, Memorandum Opinion and Order, NSD No. NSD-LM-97-26, DA 98-923 ¶ 11 (CCB rel. May 18, 1998) ("*SWBT Modification Order*").

that comprise the rest of the State Network, because data traffic from the northeast must be hauled across the LATA boundary that divides the Sioux City, Iowa and Omaha, Nebraska LATAs. If, however, the State were permitted to purchase from U S WEST data links of the same capacity as the existing interLATA links in the northeastern region, the cost savings would be substantial. More significantly, the relief sought in this petition would give the State an affordable means of upgrading some or all of the interLATA links in the northeastern region to the T-1 level; such upgrades in turn would dramatically improve the efficacy of that portion of the State Network. Described below are (1) the applications supported by the State Network, (2) limitations of the existing links in the northeast region caused by the LATA boundary, and (3) advantages of replacing existing interLATA links with frame-relay connections provided by U S WEST.

The State Network

The State Network supports both governmental and public advanced services applications. Government agencies — such as the State Departments of Labor and Heath and Human Services as well as various local and State law enforcement agencies — use the State Network to access mainframes and servers and communicate with officials located elsewhere in the State (or outside Nebraska, in the case of some agencies administering federal programs). *See* Declaration of Brenda Decker ("Decker Decl.") ¶ 5 (attached at Tab A). The Division of Communications also uses the State Network to provide agencies with Internet access and domain-name services. *Id.* And the State Network supports compressed video transmission (H.320-protocol), which is used by state agencies, schools, and members of the public for videoconferencing, distance learning, and telemedicine. *Id.* The Division of Communications operates 28

public videoconferencing sites across Nebraska, which can connect to additional public and private sites. *Id.*

The State Network supports both frame-relay and non-frame applications and comprises both frame-relay links and routers and non-frame private lines. The Division of Communications purchases most of the network services and facilities used to provide service *within* each of the four LATAs that are covered by the State Network from U S WEST !nterprise, Aliant Communications Co., and other local exchange carriers. *See id.* ¶ 6. To provide service *across* LATA boundaries, the Division purchases connections from AT&T and Aliant, who in turn often use the facilities of other IXCs. *Id.*

The northeastern part of Nebraska does not enjoy the same access to high-quality, high-speed data applications as the rest of the State. *See id.* ¶ 10. The boundary between the Omaha and Sioux City LATAs divides this northeastern region. *See* Tab B (maps). The communities furthest north and east — including South Sioux City, Dakota City, and the Native American reservations in Winnebago and Macy — are assigned to the Sioux City, Iowa LATA. The remainder of this area is assigned to the Omaha, Nebraska LATA. Most of the communities in the northeastern region are small towns and rural communities with very limited economic and industrial development beyond the food-processing and meatpacking industries. *See* Decker Decl. ¶ 7. These communities depend on their communications links to the Omaha LATA to receive government and educational services from the State. *See id.*

For example, the State Network supports the following applications in northeastern Nebraska:

- The Dakota County Sheriff's office, the Macy and Winnebago police departments, and the Dakota County courthouse connect to state and federal law-enforcement databases, including those maintained by the FBI's National Crime Information Center.

- Nebraska Department of Health and Human Services branches in South Sioux City, Dakota City, Macy, and Winnebago connect to servers in Omaha and elsewhere to administer WIC and N-Focus (the state general assistance and welfare-to-work programs), maintain employment listings, and conduct job training.

- The Nebraska Division of Motor Vehicles, Department of Roads, and Property Tax Division each operate branch offices in Dakota City that require instant access to data stored elsewhere in the State.

- The Dakota County Attorney connects to state and national databases of child-support violators to administer the federal CHARTS (Children Have a Right To Support) program.

- The Macy Indian Community College provides Internet access to faculty and students.

Id. ¶ 5.

Limitations of Existing InterLATA Links

The cost, capacity, and network management attributes of the existing interLATA links in northeastern Nebraska are not responsive to the State's needs. Because of regulatory barriers to U S WEST's provision of interLATA service, direct interLATA data transport facilities in this part of Nebraska are scarce and consequently expensive. At the prices that the few interLATA carriers now in the market are charging, the State can afford only a handful of low-capacity links — eight 56K frame connections and two multipoint private lines (one 56K and one 9.6K) that connect seven sites — to extend the State Network from Omaha into the northeast part of the state. Decker Decl. ¶ 8. The State purchases the eight frame links and two private lines from AT&T and Aliant at a total cost of $7,293.85 per month. *Id.* ¶ 9; *see also* Table 1 (attached at Tab C).

These rates appear to be representative of currently available interLATA rates for these facilities, and no carrier has come forward with a better price. *See id.*

The capacity of the existing interLATA links is barely adequate to handle the State Network's current traffic volumes, and those volumes will only increase as current network applications are upgraded. *Id.* ¶ 10. The Nebraska Department of Labor is putting more and more employment listings and job-training activities on its servers in other parts of the state, for example, and neither case workers nor clients in northeastern Nebraska can easily access this information over the State Network. *Id.* Similarly, while the State's Department of Health and Human Services is increasing its use of the State Network to track the movement of welfare recipients, case workers in the northeast already have much more difficulty accessing databases than those operating elsewhere in the State. *Id.* Moreover, the FBI is in the process of upgrading the National Crime Information Center databases to provide richer and more graphics-oriented content; this enhanced content would overwhelm the law-enforcement agencies' existing State Network links in the northeast region. *Id.*

The limited capacity of these interLATA links also prevents the State from deploying network applications and offering information services in the northeast that it provides throughout the rest of Nebraska. *See id.* ¶ 11. For years, state and local officials, business leaders, schools, and the reservations have asked the Division of Communications to establish a public videoconferencing site in South Sioux City similar to the 28 sites already being operated in other parts of the State. *Id.* They also have requested that the State extend the compressed-video network into the northeastern part of the state for distance-learning applications. *Id.* But tolerable-quality video

applications cannot be run over a 56K network link. *Id.* As a result, the communities in northeastern Nebraska are deprived of the distance learning, telemedicine, and other videoconferencing programs and applications currently available in other parts of the state — even though these smaller and more isolated communities are the ones that would benefit most from these programs. *Id.*

Wholly apart from these capacity constraints, the existing interLATA links are subpar in terms of flexibility and network management. *Id.* ¶ 12. Having multiple carriers provide components of the State Network makes it harder to monitor the Network and respond proactively to any data disruptions or physical network problems. *See id.* Another problem with Nebraska's current service in the northeastern part of the State results from AT&T's unwillingness to offer or provide public network-to-network interfaces ("NNIs") to the U S WEST frame facilities in the Omaha or Sioux City LATAs. *Id.*[5] The lack of public NNIs further makes it difficult to manage, monitor, or service the current State Network in the northeast region. *Id.*

Advantages of Replacing Existing InterLATA Links with U S WEST Frame Connections

Permitting U S WEST to modify the existing LATA boundary so that it may carry data traffic on the State Network between northeastern Nebraska and Omaha would enable the State to achieve substantial cost savings and, even more important, permit the State to obtain connections of higher quality and greater capacity at a significantly better price than is currently available from the interLATA carriers. *See*

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[5] An NNI is a standard interface used between and among switches to help isolate and manage traffic. Although AT&T might be willing to provide a private NNI — *i.e.*, a dedicated private line rather than a shared frame-to-frame link — such a service would be far more expensive than a public NNI. *See* Decker Decl. ¶ 12.

Decker Decl. ¶ 14. In turn, the State would be able to offer more and better high-speed information services to the smaller, rural, and Native American communities in the northeast. *Id.*

U S WEST is willing to replace the State Network's eight existing interLATA frame-relay links and two multipoint private lines with frame connections of the same (or greater, in the case of the 9.6K private line) capacity for approximately $5,500 per month.[6] In other words, the Division could save approximately $21,400 (or 25%) per year on its existing network if the LATA boundary were modified. *See* Table 1.[7] U S WEST has access to existing facilities that connect Sioux City, Iowa and Omaha, Nebraska, and owns interoffice facilities that link South Sioux City, Nebraska to Sioux City, Iowa. In addition, construction of additional U S WEST facilities might be appropriate if the State's data-transport needs expand or if U S WEST were permitted to aggregate additional data traffic over such facilities; such construction, in turn, could result in further savings for the State.

Allowing U S WEST to replace these interLATA links also would increase the State's ability to manage its Network, since U S WEST would provide whole-network monitoring and a single point of contact for service. *See* Decker Decl. ¶ 14. Moreover, U S WEST's ability to provide an end-to-end frame-relay service would facilitate the addition of "logical"capacity to the network — *i.e.*, private virtual channels

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[6] These prices have been developed specifically for the expanded State frame relay network and are above cost. In addition to the recurring charges, U S WEST would impose nonrecurring installation-related charges. U S WEST also would consider replacing the State's existing private line links with 56K private line connections, but has not developed pricing for these connections.

[7] The State's savings on recurring charges would be even greater if it opted to enter into a five-year pricing agreement. *See* Table 1.

("PVCs") — and thereby allow multiple users to share a single PVC, resulting in greater network efficiencies. *See id.* ¶¶ 12, 14. And because U S WEST would use a shared backbone, it would be much more cost effective for the State to add incremental PVCs than it is now (the shared nature of the backbone greatly simplifies the expansion process). *See id.* ¶ 14.

Most importantly, if U S WEST were permitted to replace existing interLATA facilities with its own connections, the State would be able to upgrade the capacity of some or all of the existing facilities to the T-1 level and therefore deploy a host of advanced services in the northeast region. If the LATA boundary were modified, U S WEST would be willing to upgrade existing frame and private line links to T-1 speed for approximately $1,675 to $2,345 per link per month, plus port charges and a nonrecurring installation charge. *See* Table 2 (attached at Tab C).[1] Thus, the State would be able to increase capacity by a factor of 24 by paying only about four times more than the average price it now pays for a 56K frame link. *See* Tables 1 & 2. By contrast, purchasing such high-capacity links from AT&T or MCI (the State is unaware of any other carrier offering service) is not an affordable option for the State. *See* Decker Decl. ¶ 13; Table 2. Based on the tariffed rates offered by those carriers, replacing the State Network's existing interLATA frame and private line links with T-1 frame connections would cost the State approximately $3,600 to $4,000 per link per month (plus port charges) — roughly twice U S WEST's average T-1 price and eight times the average current price for a 56K link. *See* Table 2. U S WEST's proposed prices accordingly

[1] The facilities U S WEST would use to connect Sioux City, Iowa and Omaha, Nebraska have sufficient capacity to permit the State to upgrade all of the links in the northeastern region to the T-1 level. Pricing is based on the migration to frame-relay connections only. *See* Table 2.

would make capacity upgrades far more attractive and realistic for the State. *See* Decker Decl. ¶ 13. In any event, purchasing higher-capacity links from AT&T or MCI would not solve the State's network management problems; as noted above, the State would prefer to have the Omaha-area network facilities and the northeastern Nebraska network operated and managed as a single, integrated entity by U S WEST !nterprise. *See id.*

Upgrading the capacity of key frame and private line connections in northeastern Nebraska would enable the State to offer more and higher-quality services in some of the communities that need them most. With affordable T-1 connections, the Division could finally open a public videoconferencing site in the Sioux City LATA and bring distance learning, telemedicine, and other videoconferencing applications to the schools, reservations, government agencies, businesses, and other institutions in northeastern Nebraska. *Id.* ¶ 16. In addition, such high-speed links would boost the effectiveness of all government agencies that currently rely on the State Network to deliver services and perform administrative functions. *See id.*

ARGUMENT

I. THE COMMISSION HAS CLEAR STATUTORY AUTHORITY TO GRANT TARGETED INTERLATA RELIEF AS REQUESTED.

Section 706 of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by removing regulatory barriers to infrastructure investment. 47 U.S.C. § 157 nt. The Commission has recognized that targeted interLATA relief may be an appropriate and necessary tool in responding to this mandate. *See Advanced Services NPRM* ¶ 194. In particular, the Commission may rely on section 3(25) of Act, which

provides that a local access and transport area ("LATA") is an area "established or *modified* by a Bell operating company . . . [and] approved by the Commission." 47 U.S.C. § 153(25) (emphasis added). As the Commission has repeatedly recognized, this section plainly "permits modification of LATA boundaries by Bell Operating Companies (BOCs), if such modifications are approved by the Commission."[9]

The Commission and the Common Carrier Bureau have exercised this statutory approval authority numerous times to authorize BOCs to serve single communities of interest that are divided by LATA boundaries.[10] Although most of these modifications have been relatively broad, permitting the BOC to provide *all* of its local services to *all* customers in the cross-boundary community of interest, nothing in the Act prevents the Commission from approving a *narrower* modification limited to one type of service or a single customer. As the Commission has held, "LATA modification for a limited purpose is both consistent with the statute and serves the public interest." *ELCS Order* ¶ 17.

The Common Carrier Bureau has further held that the Commission possesses statutory authority to approve boundary modifications limited solely to

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[9] *ELCS Order* ¶ 1; *SWBT Modification Order* ¶ 13 ("Contrary . . . to AT&T['s contention] . . . the Commission does have the authority to approve LATA boundary modifications that are not anti-competitive.").

[10] *See, e.g., Bell Atlantic-Massachusetts, Inc. Petition for Limited Modification of LATA Boundary To Provide Expanded Local Calling Service (ELCS)*, No. NSD-L-98-114, DA 98-2054 (rel. Oct. 15, 1998); *Ameritech Petition for Limited Modification of LATA Boundaries To Provide Expanded Local Calling Service (ELCS)*, CC Docket No. 96-159, DA 98-2027 (rel. Oct. 15, 1998); *Bell Atlantic-Virginia, Inc. Petition for Limited Modification of LATA Boundaries To Provide Expanded Local Calling Service (ELCS)*, No. NSD-L-98-91, DA 1740 (rel. Sept. 2, 1998); *Ameritech Petition for Limited Modification of LATA Boundaries To Provide Expanded Local Calling Service (ELCS)*, No. NSD-L-98-87, DA 98-1387 (rel. July 16, 1998).

advanced services, and that such modifications are desirable where they enable BOCs to deploy advanced services to communities that otherwise would be underserved. *See SWBT Modification Order* ¶ 14 (granting request for a LATA boundary modification allowing SBC to provide ISDN in one LATA through facilities in a different LATA). The full Commission recently cited this decision with approval in the *Advanced Services NPRM*, noting "that some modification of LATA boundaries may be necessary to provide subscribers in rural areas with the same type of access to the Internet that other subscribers throughout the nation enjoy."[11] More generally, the Commission recognized that targeted interLATA relief may be necessary "to ensure that all consumers, even those in rural areas, are able to reap the benefits of advanced telecommunications capability."[12] The Commission therefore appears to recognize that it can and should use its statutory authority to approve requests for targeted interLATA relief where necessary to fulfill Congress's explicit directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[13]

Approval of the boundary modification requested in this petition is well within the Commission's statutory authority. Petitioners are not asking the Commission for permission to provide any service other than data carriage, serve any customer other than the State of Nebraska, or even provide any application for the State beyond the State Network. Petitioners thus seek only a "moderate change" in the existing boundary, *MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 228 (1994), not a "wholesale abandonment or

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[11] *Advanced Services NPRM* ¶ 194.

[12] *Id.* ¶ 84.

[13] Pub. L. 104-104, § 706(a), 110 Stat. 153 (1996), *codified at* 47 U.S.C. § 157 nt.

elimination of" the interLATA restriction. *MCI Telecom. Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). The Commission and Common Carrier Bureau have expressly recognized the difference between targeted interLATA relief of the sort that petitioners are requesting (which is clearly permissible) and broad-scale waivers of section 271 (which are not currently permissible). The Bureau has stated, for example, that boundary modifications do not constitute a "'piecemeal dismantling' of the prohibition on the BOCs' provision of interLATA service."[14] Likewise, the Commission has drawn a clear distinction between the "large-scale changes in LATA boundaries" that carriers had sought in the *Advanced Services* docket and "targeted relief" of the sort that petitioners are requesting here. *Advanced Services NPRM* ¶ 82.

In addition, as explained in more detail below, petitioners are seeking this modification for an important and appropriate purpose: Modifying the current boundary will enable the State of Nebraska to deploy high-speed information services in small communities that are otherwise too costly to serve and accordingly do not enjoy the same benefits afforded by the State Network as other citizens of Nebraska enjoy. *See* Decker Decl. ¶ 10. By exercising its section 3(25) authority to approve this modification, therefore, the Commission would be furthering its congressional mandate to encourage the deployment of advanced services "to all Americans." Act § 706(a), 47 U.S.C. § 157 nt.

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[14] *Petition for Declaratory Ruling Regarding U S WEST Petitions To Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd 4738, ¶¶ 27 (CCB 1997).

II. THE COMMUNITY BENEFITS THAT WOULD RESULT FROM GRANTING TARGETED INTERLATA RELIEF FAR OUTWEIGH ANY NEGLIGIBLE EFFECTS ON COMPETITION.

The Commission has recognized that it is inappropriate to require a BOC to prove its compliance with the full section 271 checklist when all it seeks is the limited modification of a LATA boundary, and it has properly rejected IXCs' attempts to write section 3(25) out of the Communications Act.[15] Instead, the parties proposing a boundary modification must show only that the modification would meet a significant community need and not unreasonably threaten competition.[16] That standard is easily met here.

A. Granting Targeted InterLATA Relief Would Fulfill Significant Community Needs.

The State's need for the proposed LATA boundary modification stems from the high cost, limited capacity, and subpar network management attributes of the existing interLATA links in northeastern Nebraska. As described above and in the attached declaration of Brenda Decker of Nebraska's Division of Communications, the current boundary between the Omaha and Sioux City LATAs directly limits the high-speed telecommunications and information services that the State is able to deploy in the small towns and Native American communities of northeastern Nebraska, and hampers the ability of State, local, and tribal officials in this area to serve the public. The scarcity and resulting high cost of interLATA data transport facilities in this region has forced the

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[15] The Commission has appropriately recognized that sections 3(25) and 271 present entirely distinct avenues for interLATA relief, *see ELCS Order* ¶¶ 13-14, 17, and that "requiring the BOCs to meet the Section 271 requirements would not be the most expeditious way to ensure that local telephone service can be provided to [cross-boundary communities of interest] in a timely matter." *Id.* ¶ 14. *See also SWBT Modification Order* ¶ 13.

[16] *See ELCS Order* ¶ 17; *SWBT Modification Order* ¶ 11.

State to limit the capacity of the links there to 56K. Decker Decl. ¶ 8. While this bandwidth shortage already causes numerous problems for the State and residents of northeast Nebraska, as usages volumes increase, the already-congested links will support fewer and even less reliable services. *See id.* ¶ 10. Moreover, the absence of an end-to-end frame relay service diminishes the quality of network management and reduces the capability for proactive responses to data disruptions and errors. *See id.* ¶ 12.

As an initial matter, granting targeted interLATA relief so that U S WEST may carry what is now interLATA data traffic would entail substantial cost savings for the State, even if it were to refrain from upgrading the capacity of any of its 56K links. *See* Table 1. The Commission has repeatedly recognized that the prospect of significantly lowering customer prices can justify approving the modification of a LATA boundary.[17] Paired with the added network management benefits that would result from moving to an end-to-end frame relay service, *see* Decker Decl. ¶ 12, this price reduction justifies modification of the LATA boundary separating the Omaha and Sioux City LATAs in Nebraska.

Moreover, affording the relief requested in this petition would permit the State to upgrade the capacity of key links and thereby introduce much-needed services to the northeastern region. For example, none of the State's 28 public videoconferencing sites is located in the northeastern part of the State, and local officials, businesses,

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[17] *See, e.g., SWBT Modification Order* ¶ 13 (concluding that, even though it was theoretically possible to provide ISDN in a community without LATA boundary modification, the need to build redundant facilities would make the service too costly); *ELCS Order* ¶ 18 (justifying modifications on ground that "many community services (such as hospitals, doctors offices, schools, stores, public transportation facilities, and government offices) were located in a nearby community in the adjacent LATA, and . . . the need to make interLATA toll calls for such services caused significant expenses for residents").

schools, and Native American reservations have made clear their strong interest in obtaining at least one. *See id.* ¶ 11. With selected T-1 connections provided by U S WEST, the State could finally afford to meet this need and thereby bring distance learning, telemedicine, and other applications to the schools, reservations, government agencies, businesses, and other institutions in northeastern Nebraska. *Id.* ¶ 16. In addition, upgrading the State Network would give State, local, and tribal officials better access to high-speed data communications (and applications such as the ones described above), enabling them to serve their communities more effectively. Case workers employed by the Departments of Labor and Health and Human Services, for example, would be able to serve their clients more effectively and rapidly if their access to State databases improved. *See id.* ¶ 10. Importantly, these are not simply pie-in-the-sky applications; they are services that the State of Nebraska is already providing today in other parts of the State where LATA boundaries do not hamper the capacity and robustness of the State Network. *Id.* ¶ 16. As the Commission recognized in the *Advanced Services* proceeding, targeted interLATA relief may be necessary to facilitate the deployment of advanced capability to rural areas that are currently underserved. *See Advanced Services NPRM* ¶ 194.

None of these benefits would be available absent the proposed relief, because other carriers' rates for upgrading to T-1 links are prohibitive. *See* Decker Decl. ¶ 13. Those rates are more than twice as high as U S WEST's in some cases. *See* Table 2. The uneconomical nature of this alternative to modifying the LATA boundary demonstrates that the boundary modification would serve the public interest. *See SWBT Modification Order* ¶ 13. In any event, purchasing higher-capacity links from AT&T or

MCI would not solve the Division's network management problems, since the State would prefer to have the Omaha-area network facilities and the northeastern Nebraska network operated and managed as a single, integrated entity by U S WEST !nterprise. Decker Decl. ¶ 13.

B. Approving the Request for Targeted InterLATA Relief Would Not Adversely Affect Competition or Dilute U S WEST's Incentives To Meet the Section 271 Checklist.

The targeted relief that petitioners have proposed will not harm competition in the local and long distance telecommunications marketplaces. Like the ELCS modifications the Commission has approved, the proposed modification "involves only a small number of customers [and] access lines." *ELCS Order* ¶ 18. And like the ISDN-specific boundary modification the Common Carrier Bureau approved for SBC, "the potential for harm is minimal due to the limited scope of [the] request." *SWBT Modification Order* ¶ 13. Indeed, petitioners' proposed modification is even *more* limited than in these other cases: It is for data carriage only (unlike the ELCS modifications), and it is limited to a single network for a single customer (unlike either the SBC ISDN or ELCS modifications, which enabled the BOC to serve all customers in a given geographic area).

Likewise, petitioners' proposed relief is simply too narrow to substitute for full section 271 approval. The proposed relief would not allow U S WEST to provide interLATA voice services, to carry data traffic between LATAs other than the Omaha and Sioux City LATAs, to serve customers other than the State of Nebraska, or even to carry data for the State off the State Network. Moreover, the State has no plans to use the State Network for basic voice services, and approving the proposed relief would not

affect the State's choice of an interLATA voice carrier. Decker Decl. ¶ 17.

U S WEST wants to be able to provide the full range of interLATA services in Nebraska, and it therefore already has applied to the Nebraska Public Service Commission under section 271 for full interLATA relief. U S WEST would not abandon this application for full relief if permitted to provide the State with a handful of data links in an isolated corner of Nebraska. As the Commission has properly recognized, limited-purpose relief of the sort petitioners propose is simply incapable of having a "significant anticompetitive effect on . . . the BOCs' incentive to open their own markets." *ELCS Order* ¶ 18.

If anything, permitting U S WEST to provide high-speed data links for the State of Nebraska would be *pro*competitive, as it would bring a new entrant into a marketplace ripe for such entry. The Nebraska Division of Communications is a real customer that has been looking for reasonably priced advanced services for the northeast region for years, to no avail. Petitioners suspect that, in response to this petition, multiple IXCs may come forward and suddenly proclaim their willingness to carry data for the State Network at prices well below what the State is paying now. But the simple fact is that the IXCs did not market these services and offer these prices to the State *before* this petition was filed. Any such rear-guard price cuts and service commitments by heretofore silent IXCs will only demonstrate just how powerful a spur to competition the prospect of U S WEST entry into this currently stagnant marketplace can be. And such belated offers of future service do not substitute for U S WEST's commitment and ability to provide reliable and reasonably priced services today.

CONCLUSION

For the foregoing reasons, the Commission should approve the proposed targeted interLATA relief to permit U S WEST to connect the State Network sites in northeastern Nebraska to the network facilities in Omaha.

Respectfully submitted,

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January 15, 1999

ATTACHMENTS TO

PETITION OF JOINT PETITION OF THE STATE OF NEBRASKA AND U S WEST COMMUNICATIONS, INC. FOR TARGETED INTERLATA RELIEF

Tab	Item
A.	Declaration of Brenda Decker
B.	Maps of Northeastern Nebraska Region
C.	Tables of U S WEST's and Other Carriers' Prices

DECLARATION OF BRENDA DECKER

1. I am the Acting Director of the State of Nebraska's Division of Communications of the Department of Administrative Services. I have held various positions within the Division of Communications, including Telecommunications Analyst, Business Manager, Deputy Director and Acting Director, for the past 20 years. I have a Bachelor's Degree in Business and am currently working on a Master's degree in Management.

2. My current job responsibilities include coordinating the purchase, lease, and use of communications services, equipment, and facilities for the State; consolidating telephone and telephone-related activities and providing for their joint use by State agencies; and contracting with qualified suppliers and communications common carriers for facilities or services, including private-line services.

3. I make this declaration to describe how the current LATA boundary in northeastern Nebraska severely constrains the State's ability to deploy high-speed data applications and serve citizens in that part of Nebraska. I also describe how modifying the boundary to permit U S WEST to provide what is now an interLATA link of the State's network in this area would enable the State to deploy more advanced applications and services to more communities.

4. The Nebraska Department of Administrative Services, Division of Communications, operates a Nebraska-wide high-speed data network that connects various State, county, and local government agencies and educational institutions ("the State Network"). The State Network also connects some government and tribal offices

and schools on Native American reservations, including the Winnebago and Omaha reservations in northeastern Nebraska.

5. The State Network supports many different applications and government services. Many agencies use the network to access mainframes and servers and communicate with officials located elsewhere in the state (or outside Nebraska, in the case of some agencies administering federal programs). The Division of Communications also uses the State Network to provide agencies with Internet access and domain-name services. In northeastern Nebraska, for example, the State Network supports the following applications:

- The Dakota County Sheriff's office, the Macy and Winnebago police departments, and the Dakota County courthouse connect to state and federal law-enforcement databases, including those maintained by the FBI's National Crime Information Center.
- Nebraska Department of Health and Human Services branches in South Sioux City, Dakota City, Macy, and Winnebago connect to servers in Omaha and elsewhere to administer WIC and N-Focus (the state general assistance and welfare-to-work programs), maintain employment listings, and conduct job training.
- The Nebraska Division of Motor Vehicles, Department of Roads, and Property Tax Division each operate branch offices in Dakota City that require instant access to data stored elsewhere in the State.
- The Dakota County Attorney connects to state and national databases of child-support violators to administer the federal CHARTS (Children Have a Right To Support) program.
- The Macy Indian Community College provides Internet access to faculty and students.

The State Network also supports compressed video transmission (H.320-protocol), which is used by state agencies, schools, and members of the public for videoconferencing, distance learning, and telemedicine. The Division of Communications operates 28 public videoconferencing sites across Nebraska, which can connect to additional public and

private sites. For reasons explained below, however, the State cannot offer these video services in the northeastern part of Nebraska.

6. The State Network supports both frame-relay and non-frame applications and comprises both frame-relay links and routers and non-frame private lines. The State purchases most of the network services and facilities used to provide service *within* each of Nebraska's four LATAs from U S WEST !nterprise, Aliant, and other local exchange carriers. To provide service *across* LATA boundaries, the State purchases connections from AT&T and Aliant, who in turn often use the facilities of other carriers.

7. A LATA boundary divides the northeastern part of Nebraska. The communities furthest north and east — including South Sioux City, Dakota City, and the reservations in Winnebago and Macy — are assigned to the Sioux City, Iowa LATA. The remainder of this area is assigned to the Omaha, Nebraska LATA. Most of the communities in this part of Nebraska are small towns and rural communities with very limited economic and industrial development beyond the food-processing and meatpacking industries. These communities depend on their communications links to the Omaha LATA to receive government and educational services from the State.

8. The State purchases frame-relay services for the State Network within the Sioux City and Omaha LATAs from U S WEST !nterprise, which maintains a network of frame switches and links in those areas. To connect the communities in the Sioux City LATA to the state agencies and educational institutions in the Omaha LATA, the State purchases eight interLATA frame links and two multipoint private lines (which connect seven sites) from AT&T and Aliant (who in turn, I understand, purchases them

from MCI Worldcom). The frame-relay connections have a capacity of 56K, one private line is a 9.6K connection, and the other private line is 56K. The maps attached to the Petition at Tab B illustrate each of these links.

9. The portion of the State Network that includes these ten interLATA links costs the State $7,293.85 per month. Based on my review of other interLATA carriers' tariffs and price lists and my experience in negotiating and purchasing telecommunications services for the State, I believe that these prices are among the best currently available in the marketplace from those carriers able to satisfy the State's technical, service, and quality needs. To date, neither AT&T, Aliant, nor any other carrier has come forward with a better price for these interLATA links, whether for end-to-end frame-relay service or private-line service.

10. The extremely high cost of these interLATA connections limits the capacity that the State can afford to purchase and, consequently, the high-speed information services that the State can provide in these northeastern communities. The capacity of the existing interLATA links is barely adequate to handle the State Network's current traffic volumes, and those volumes are expected to increase as current network applications are upgraded. The Nebraska Department of Labor is putting more and more employment listings and job-training activities on its servers in other parts of the state, for example, and neither case workers nor clients in northeastern Nebraska can easily access this information over the State Network. Similarly, while the State's Department of Health and Human Services is using the State Network to track the movement of welfare recipients, case workers in the northeast have much more difficulty accessing databases than those operating elsewhere in the State. Moreover, the FBI is in the

process of upgrading the National Crime Information Center databases to provide richer and more graphics-oriented content; this enhanced content will overwhelm the law-enforcement agencies' existing State Network links into the northeast region.

11. The limited capacity of these interLATA links also prevents the State from deploying network applications and offering information services in the northeast that it provides throughout the rest of Nebraska. For years, state and local officials, business leaders, schools, and the reservations have asked the State to establish a public videoconferencing site in South Sioux City and extend the compressed-video network into the northeastern part of the state. But tolerable-quality video applications cannot be run over a 56K network link. As a result, the communities in northeastern Nebraska are deprived of the distance learning, telemedicine, and other videoconferencing programs and applications currently available in other parts of the state — even though these smaller and more isolated communities are the ones that would benefit from these programs the most.

12. Moreover, the existing interLATA links are less than ideal in terms of flexibility and network management. The State would prefer to have a single carrier provide an end-to-end frame-relay service to take advantage of the 24-hour monitoring and improved responses to network failures that such integration would afford. And because frame-relay service easily accommodates the addition of "logical"capacity to the network — *i.e.*, private virtual channels ("PVCs") — and allows multiple users to share a single PVC, it is a far more efficient service. Moreover, AT&T's unwillingness to offer the State public network-to-network interfaces ("NNIs") to the U S WEST frame facilities in the Omaha or Sioux City LATAs makes it difficult to manage, monitor, or

service the current State Network in the northeast region. The State could not afford to pay for private NNIs, which I understand that AT&T does offer at tariffed rates in Nebraska.

13. Purchasing higher-capacity links from AT&T, Aliant, or any other interLATA carrier in the market is not an affordable option. Based on AT&T, MCI, and Sprint's tariffs, replacing the 56K and 9.6K links in the northeastern part of the State with T-1 frame-relay links would cost the State approximately $3,600 to $4,000 per link per month (plus port charges), which is more than the State can afford. Table 2 (attached to the Petition at Tab C) breaks this cost down for each link. Again, based on my experience and reviews of other carriers' tariffs and price lists, I believe that this figure is close to the best price that the State could obtain in the marketplace. In any event, purchasing higher-capacity links from these carriers would not solve the State's network management problems, since the State would prefer to have the Omaha-area network facilities and the northeastern Nebraska network operated and managed as a single, integrated entity by U S WEST !nterprise. It is my understanding, however, that U S WEST may not provide this service because it is not allowed to carry traffic of any kind across the LATA boundary in northeastern Nebraska.

14. U S WEST has represented that if this LATA boundary were modified to permit the company to carry packet-switched traffic on the State Network between northeastern Nebraska and Omaha, it could provide the State with higher quality and capacity connections at a significantly better price than is currently available from the interLATA carriers. If so, then modifying the LATA boundary would enable the State of Nebraska to deploy a more robust network and offer more and better high-speed

information services to the smaller, rural, and Native American communities in the northeast. U S WEST has represented, for example, that it could replace the State Network's existing interLATA links with frame relay PVCs of the same capacity for about $5,500 per month, about 25% less than the State currently pays. Having U S WEST provide these links would increase the ease of managing and reliability of the State Network, even without a capacity upgrade, since U S WEST would provide whole-network monitoring and a single point of contact for service. Replacing the current links with U S WEST frame PVCs also would increase the flexibility of the network by making it easier to reconfigure connections and add additional users. And because U S WEST would use a shared backbone, it would be much more cost effective for the State to add incremental PVCs than it is now.

15. If U S WEST were permitted to provide these northeastern links, the State could afford to increase the capacity of selected circuits within the State Network to the T-1 level and could offer Nebraska citizens additional information services. I understand that, if the LATA boundary were modified, U S WEST could provide the State with T-1 frame connections for approximately $1,675 to $2,345 per T-1 per month (plus port charges). These upgraded links, too, would improve the flexibility and network management attributes of the State Network.

16. Upgrading some or all of the State Network's existing frame and private-line connections would enable the State to offer more and higher-quality services in some of the communities that need them most. With more affordable T-1 connections, the State might open a public videoconferencing site in the Sioux City LATA and bring distance learning, telemedicine, and other videoconferencing applications to the schools,

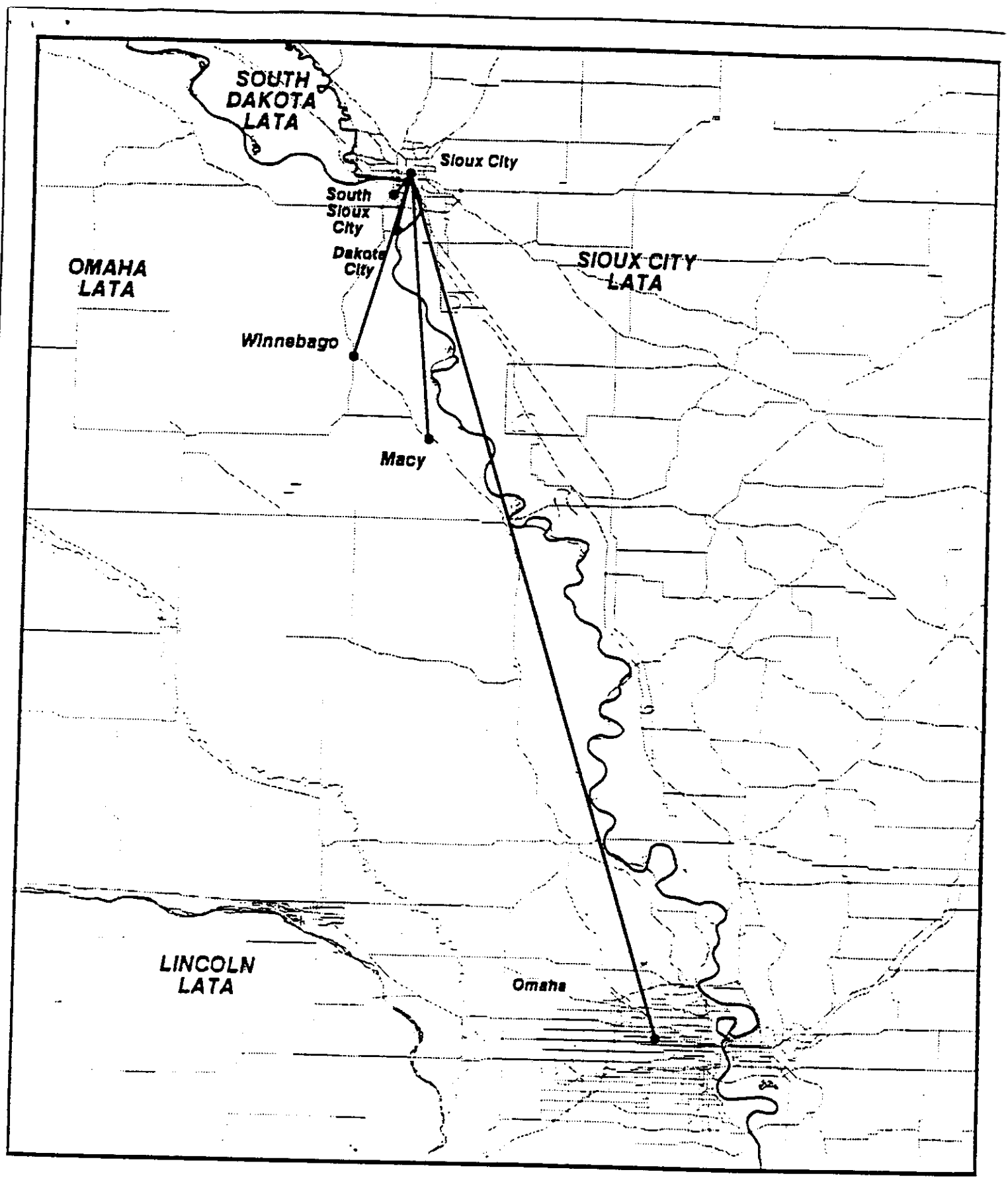
reservations, government agencies, businesses, and other institutions in northeastern Nebraska. In addition, upgrading the State Network would give State, local, and tribal officials better access to high-speed data communications (and applications such as the ones described above), enabling them to serve their communities more effectively.

17. The State of Nebraska does not route voice traffic on the State Network and has no plans to do so in the future, whether or not the LATA boundary in northeastern Nebraska is modified. Modifying the boundary will not affect the State's selection of its interLATA voice carrier (currently AT&T).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of January, 1999.

Brenda L. Decker

Brenda Decker
Acting Director, Division of Communications



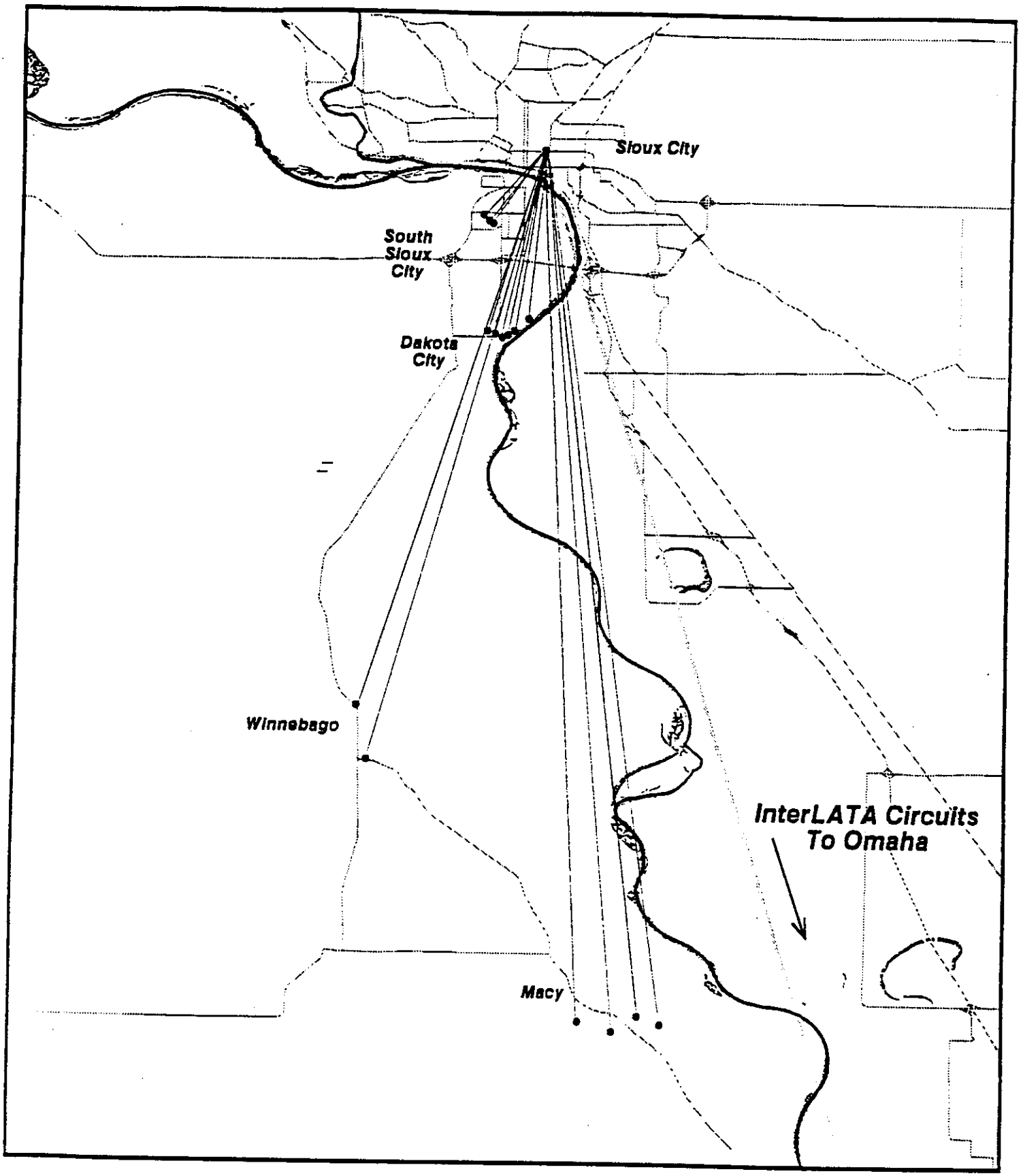
State of Nebraska
Network
Northeast Portion

N

Legend

Lata

- Sioux City
- South Dakota
- Omaha
- Lincoln



State of Nebraska Network Northeast Portion

N

Legend

Lata

Sioux City
South Dakota
Omaha

56k Frame Relay
56k Private Line Multipoint
9.6k Private Line Multipoint

1/8/99

Table 1

Existing 56K Frame Relay Circuits

	Circuit Route[1]	Application	Capacity	Current Rate	USWEST Rate	USWEST Rate	Competitors' Rates[2]	
					Month-to-Month	60-Month	Month-to-Month	60-Month
1	Macy	Community College	56KFRS	623.44	338.76	313.99	555.00	550.00
2	Macy	Health and Human Services	56KFRS	623.44	338.76	313.99	555.00	550.00
3	Dakota City	Dakota County Attorney	56KFRS	778.89	197.00	178.80	498.00	473.00
4	Dakota City	Property Tax Division	56KFRS	452.57	197.00	178.80	498.00	473.00
5	Dakota City	Health and Human Services	56KFRS	452.57	197.00	178.80	498.00	473.00
6	So. Sioux City	Health and Human Services	56KFRS	483.14	197.00	178.80	498.00	473.00
7	So. Sioux City	Health and Human Services	56KFRS	483.14	197.00	178.80	498.00	473.00
8	Winnebago	Health and Human Services	56KFRS	515.36	314.94	292.33	525.00	518.00
9	Dakota City	Courthouse	56K Private Line Multi-point	1,653.95	197.00	178.80	498.00	473.00
	Dakota City	Dept. of Motor Vehicles			197.00	178.80	498.00	473.00
	So. Sioux City	Dept. of Roads			197.00	178.80	498.00	473.00
	Macy	Health and Human Services			338.76	313.97	555.00	550.00
10	Winnebago	Police Dept.	9.6K Private Line Multi-point	1,227.35	314.94	292.33	525.00	518.00
	Macy	Police Dept.			338.76	313.99	555.00	550.00
	Dakota City	Sheriff			197.00	178.80	498.00	473.00
			Port Charge[3]		1,751.50	1,592.60	2,777.00	2,727.00
	TOTAL			7,293.85	5,509.40	5,042.40	10,529.00	10,220.00

[1]All circuits routed to Omaha.

[2]Competitor rates are based on MCI's tariffed Frame Relay rates and do not reflect any discounts.
MCI's tariffed Frame Relay rates are lower than AT&T's.

[3]Port Charge assumes upgrade of all circuits to 56K Frame Relay - upgrading fewer circuits would reduce the port charge.

Table 2

Proposed Charges to Upgrade Network to 1.544 KBS Frame Relay Service at Each Location

	Circuit Route[1]	Application	Capacity	USWEST Rate	USWEST Rate	Competitors' Rates[2]	
				Month-to-Month	60-Month	Month-to-Month	60-Month
1	Macy	Community College	1.544FRS	2,345.49	1,836.80	3,979.00	3,823.00
2	Macy	Health and Human Services	1.544FRS	2,345.49	1,836.80	3,979.00	3,823.00
3	Dakota City	Dakota County Attorney	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
4	Dakota City	Property Tax Division	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
5	Dakota City	Health and Human Services	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
6	So. Sioux City	Health and Human Services	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
7	So. Sioux City	Health and Human Services	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
8	Winnebago	Health and Human Services	1.544FRS	2,194.72	1,711.16	3,880.00	3,744.00
9	Dakota City	Courthouse	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
10	Dakota City	Dept. of Motor Vehicle	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
11	So. Sioux City	Dept. of Roads	1.544FRS	1,676.50	1,322.85	3,603.00	3,522.00
12	Macy	Health and Human Services	1.544FRS	2345.49	1,836.80	3,979.00	3,823.00
13	Winnebago	Police Dept.	1.544FRS	2,194.72	1,711.16	3,880.00	3,744.00
14	Macy	Police Dept.	1.544FRS	2,345.49	1,836.80	3,979.00	3,823.00
15	Dakota City	Sheriff	1.544FRS	1676.5	1,322.85	3,603.00	3,522.00
			Port Charge[3]	10,306.00	8,099.40	11,249.00	11,021.00
	TOTAL			39,165.90	30,774.57	67,352.00	65,499.00

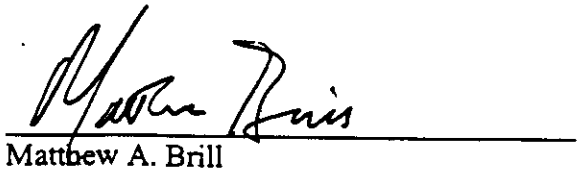
[1]All circuits routed to Omaha.

[2]Competitor rates are based on MCI Frame Relay tariffed rates and do not reflect any discounts. MCI's tariffed Frame Relay rates are lower than AT&T's.

[3]Port Charge assumes upgrade of all circuits to 1.544 Frame Relay--upgrading fewer circuits would reduce the port charge.

CERTIFICATE OF SERVICE

I certify that on January 15, 1998, copies of the Joint Petition of the State of Nebraska and U S WEST Communications, Inc. for Targeted InterLATA Relief have been served by hand on the parties listed below.



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Proceeding ..... MTS C Section 706
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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Joint Petition of the State of Nebraska and U S WEST Communications, Inc. for Targeted InterLATA Relief	)	File No. NSD-L-99-04
	)	
	)	

RECEIVED
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OFFICE OF THE SECRETARY

REPLY COMMENTS OF STATE OF NEBRASKA AND U S WEST COMMUNICATIONS, INC.

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March 22, 1999

MAR 25 1999

SUMMARY

The State of Nebraska and U S WEST have sought highly targeted interLATA relief to meet the State's data transport needs in the northeast corner of Nebraska. Three carriers have filed comments opposing the Joint Petition, quarreling with both the Commission's legal authority and the justification for the relief. However, the Communications Act plainly authorizes the Commission to grant a limited-purpose, customer-specific modification of the boundary between the Omaha, Nebraska and Sioux City, Iowa LATAs in northeastern Nebraska. Moreover, the Joint Petition demonstrates that there is a strong need for the requested relief. AT&T's eleventh-hour assertion that it is willing and able to provide the desired services rings hollow. Neither AT&T nor any other IXC has shown to the State's satisfaction that it can provide the combination of network management attributes and affordable pricing that the State needs and U S WEST has committed to provide. Nor is there any guarantee that an IXC ever would offer an end-to-end frame relay service in northeastern Nebraska, were the Commission to deny the Joint Petition. Finally, because the Joint Petition seeks authority for U S WEST to carry only a discrete measure of data traffic -- for a single customer using a single network -- the opponents' assertions that granting the Joint Petition would harm competition are unavailing.

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Joint Petition of the State of Nebraska	)	File No. NSD-L-99-04
and U S WEST Communications, Inc. for	)	
Targeted InterLATA Relief	)	

REPLY COMMENTS OF STATE OF NEBRASKA AND U S WEST COMMUNICATIONS, INC.

The State of Nebraska and U S WEST Communications, Inc. ("U S WEST") submit these reply comments in support of their Joint Petition for Targeted InterLATA Relief. Only three parties -- AT&T Corp. ("AT&T"), Sprint Communications Co. ("Sprint"), and McLeod Telecommunications Services, Inc. ("McLeod") -- have filed comments opposing the requested relief.[1/] Contrary to the opponents' assertions, the Communications Act plainly authorizes the Commission to grant a limited-purpose, customer-specific modification of the boundary between the Omaha, Nebraska and Sioux City, Iowa LATAs in northeastern Nebraska. Moreover, the Joint Petition demonstrates that there is a strong need for the requested relief. AT&T's eleventh-hour assertion that it is willing and able to provide the desired services rings hollow. Neither AT&T nor any other IXC has shown to the State's satisfaction that it can provide the combination of network management attributes and affordable pricing that the State needs and U S WEST has committed to provide. Nor is there any guarantee that an IXC ever would offer an end-to-end frame relay service in northeastern Nebraska, were the Commission to deny the Joint Petition. Finally, because the Joint Petition seeks authority for U S WEST to carry only a modest

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1/ Ameritech filed comments in support of the Joint Petition. In addition, Senators J. Robert Kerrey and Chuck Hagel submitted letters in support of the Joint Petition (dated February 3, 1999 and February 10, 1999, respectively).

amount of data traffic -- for a single customer using a single network -- the opponents' claims that granting the Joint Petition would harm competition are unavailing.

I. THE COMMISSION PLAINLY IS AUTHORIZED TO GRANT TARGETED INTERLATA RELIEF.

The Commission has repeatedly recognized that section 3(25) of the Act "permits modification of LATA boundaries by Bell Operating Companies (BOCs), if such modifications are approved by the Commission."[2/] Moreover, "nothing in the statute or legislative history indicates that a LATA may not be modified for a limited purpose."[3/] To the contrary, "LATA modification for a limited purpose is both consistent with the statute and serves the public interest."[4/]

AT&T asserts that "§ 271(a) prohibits the BOCs from providing *any* interLATA service until *all* the requirements of § 271 are satisfied," and that "§ 3(25) does not authorize [the] relief' sought. AT&T Comments at 9. But AT&T's first argument misses the point that the Joint Petition seeks a *boundary modification*, and the Commission expressly rejected AT&T's second argument in the *SWBT Modification Order*.[5/] The Commission has long recognized that sections

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2/ *Petitions for Limited Modification of LATA Boundaries To Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, 12 FCC Rcd. 10646 ¶ 1 (1997) ("*ELCS Order*"); *see also Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries To Provide Integrated Services Digital Network (ISDN) at Hearne, Texas*, Memorandum Opinion and Order, NSD No. NSD-LM-97-26, DA 98-923 ¶ 11 (CCB rel. May 18, 1998) ("*SWBT Modification Order*").

3/ *SWBT Modification Order*, ¶ 11.

4/ *ELCS Order*, ¶ 17.

5/ *SWBT Modification Order*, ¶ 13 ("Contrary . . . to AT&T['s contention] . . . the Commission does have the authority to approve LATA boundary modifications that are not anti-competitive."); *see also ELCS Order*, ¶ 14.

3(25) and 271 present entirely distinct avenues for interLATA relief -- with section 3(25) aimed at targeted, rather than global, interLATA relief -- and it has properly rejected IXCs' attempts to write section 3(25) out of the Communications Act.[6/]

Nor is there any merit to AT&T's contention that the relief granted pursuant to section 3(25) in the *SWBT Modification Order* was "fundamentally different" from that sought in the Joint Petition. AT&T Comments at 11. Like Southwestern Bell, the State and U S WEST seek permission for U S WEST to carry data traffic only. Just as it would be "uneconomical for SWBT to provide ISDN service on an intraLATA basis,"[7/] so would it be uneconomical for the State to purchase the data capacity it needs in the absence of the requested relief.[8/] And like SWBT, the State and U S WEST request relief for a limited geographic area -- here, the northeastern corner of Nebraska. Moreover, the *SWBT Modification Order* granted interLATA relief that was *broader* in an important respect than that sought here: SWBT sought permission to provide interLATA ISDN service to *all* interested customers in the Hearne, Texas LATA, whereas the Joint Petition seeks authorization for U S WEST to provide data services *only* to the State.

AT&T is mistaken in its suggestion that the State would not be the only U S WEST customer here. AT&T Comments at 4. As the Joint Petition indicates, the State's Division of Communications within the Department of Administrative Services operates the State's data network. The Division of Communications does not resell capacity to businesses or

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6/ *See ELCS Order* ¶¶ 13-14, 17.

7/ *SWBT Modification Order*, ¶ 13.

8/ *See* Joint Petition at 10-11; Declaration of Brenda Decker at ¶ 13 (Joint Petition, Exh. A); *infra* pp. 8-9.

any other private entity; rather, it enables State agencies to use the data network for the delivery of services to citizens, who accordingly benefit from such use of the network. For example, the State Department of Health and Human Services uses the data network to administer welfare-to-work programs and maintain employment listings. Joint Petition at 6. However, the fact that various individuals *benefit* from the State's use of its data network simply does not render those individuals "customers" of U S WEST.[9/]

Section 706 of the Act supports granting the relief sought in the Joint Petition under section 3(25). As in the case of any discretionary authority, the Commission can exercise its section 3(25) broadly or narrowly. Section 706, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by removing regulatory barriers to infrastructure investment, 47 U.S.C. § 157 nt., militates strongly in favor of broad application of the Commission's boundary modification power. As the Joint Petition notes, the bandwidth deficit in northeastern Nebraska is symptomatic of the difficulty many rural areas have encountered in attempting to obtain full parity in access to advanced telecommunications and information services. Joint Petition at 2. Chairman Kennard has committed to ensuring that "all Americans become full participants in the richness of the Information age."[10/] One important tool in achieving this objective is the Commission's authority

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9/ Sometimes the public benefits more directly from the State's data network, such as when individuals or groups are permitted to use the State's videoconferencing facilities. But someone who uses the State's videoconferencing facilities does not become a customer of U S WEST, any more than a guest in the Governor's office who makes a long distance telephone call becomes a customer of AT&T; in each case, only the State is the carrier's customer.

10/ *Chairman Kennard's Agenda for 1999* (available at www.fcc.gov/Speeches/Kennard/Statements/stwek901.html).

to grant targeted interLATA relief, as the Commission recognized in the *Advanced Services Order*.[11/]

AT&T's assertion that section 706 fails to support the Joint Petition misses the mark. First, in arguing that section 706 is irrelevant because section 271 prohibits a BOC from providing interLATA service, AT&T Comments at 8-9, AT&T again fails to recognize the distinction between a limited-purpose boundary modification, which is permissible notwithstanding section 271, and full-scale interLATA relief, which is not.[12/] Second, AT&T ignores the fact that the Congress's directive in section 706 shapes the manner in which the Commission's boundary-modification authority should be implemented. Similarly, McLeod's assertion that the Commission's statements linking section 706 with targeted interLATA relief are not *binding* because they appeared in an NPRM rather than a final rule, McLeod Comments at 4, is beside the point: Whether or not the Commission is "bound," the mandate to facilitate the deployment of advanced services to all Americans comes from the Act, and the Commission is thus authorized to provide the relief requested here regardless of the outcome of the *Advanced Services* proceeding.

11/ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, CC Docket Nos. 98-147 et al., ¶ 194 (1998); *see also id.*, ¶ 84 (targeted interLATA relief may be necessary "to ensure that all consumers, even those in rural areas, are able to reap the benefits of advanced telecommunications capability").

12/ *See SWBT Modification Order*, ¶ 13.

II. THE STATE'S NEED FOR THE RELIEF FAR OUTWEIGHS ANY ASSERTED COMPETITIVE HARM.

The Commission has said that it will grant a LATA boundary modification that would meet a significant community need without unreasonably threatening competition.[13/] As the Joint Petition showed, and contrary to the comments of opponents, that standard is easily met here.

A. Opponents Fail To Rebut the State's Showing of Need.

The comments opposing the Joint Petition betray a surprising lack of respect for the State's ability to determine its own telecommunications needs. Brenda Decker, who has more than 20 years experience working for Nebraska's Division of Communications in the Department of Administrative Services,[14/] determined that the State and its constituents in northeast Nebraska would be far better served than they are now if U S WEST were permitted to carry data traffic across the LATA boundary separating the northeast region from the Omaha LATA. The State is familiar with the service capabilities of the IXCs that filed comments in this proceeding, and AT&T's claim that it was unaware of the State's need for upgraded service is not credible in light of the monthly account meetings its representative attends.[15/] U S WEST is the only carrier with significant frame relay facilities in northeast Nebraska; no other carrier has demonstrated a commitment to offer affordable and robust services and, if necessary, deploy facilities and supporting personnel.

13/ *See ELCS Order* ¶ 17; *SWBT Modification Order* ¶ 11.

14/ Decker Decl. ¶ 1.

15/ *See* Declaration of Chandra D. Wrightsell, ¶ 4 (AT&T Comments, Exh. B) (discussing monthly account meetings).

The Joint Petition demonstrated that the State needs the proposed LATA boundary modification because of the high cost, limited capacity, and subpar network management attributes of the existing interLATA links in northeastern Nebraska. The current boundary between the Omaha and Sioux City LATAs directly limits the high-speed telecommunications and information services that the State is able to deploy in the small towns and Native American communities of northeastern Nebraska, and hampers the ability of State, local, and tribal officials in this area to serve the public. *See* Decker Decl. ¶¶ 10-11. The absence of an end-to-end frame relay service diminishes the quality of network management and reduces the capability for proactive responses to data disruptions and errors. *See id.* ¶ 12. Moreover, the scarcity and resultant high cost of interLATA data transport facilities in this region has forced the State to limit the capacity of the links there to 56K. *See id.* ¶ 8.

Far from being a "red herring," AT&T Comments at 7, the issue of network management is keenly important to the State. AT&T overlooks the important difference between an end-to-end frame relay service and a network configuration in which AT&T provides an interLATA private line but fails to offer public network-to-network interfaces ("NNIs") to the U S WEST frame facilities at either end of that link. Decker Decl. ¶ 12. AT&T's unwillingness to offer public NNIs to the State makes it difficult to manage, monitor, or service the network facilities in the northeast region. *Id.* Thus, in asserting that the State merely has a "desire for 'one stop-shopping' [sic]," AT&T Comments at 2, 8, AT&T fails to grasp that an end-to-end service with NNIs is qualitatively superior, not simply more *convenient*. And AT&T's query why "no such technical problems apparently exist where interLATA links are used in other parts of the

State"[16] is easily answered: AT&T is not a significant provider of interLATA data facilities in those parts of the State. In any event, whether or not network management problems exist outside the northeast region, the State's current focus on that part of the State, where the data network is at its least robust, is perfectly appropriate.

In addition to the network management benefits that would be achieved if the Joint Petition were granted, the pricing to which U S WEST has committed further justifies the requested relief. The Commission has recognized that the prospect of significantly lowering customer prices is an important factor in approving the modification of a LATA boundary.[17] Granting targeted interLATA relief so that U S WEST may carry what is now interLATA data traffic would entail substantial cost savings for the State. While opponents conclusorily assert that IXCs could offer the State better prices for interLATA links than the Joint Petition suggests,[18] the fact remains that the prices the State currently pays to its IXC -- as opposed to *hypothetical* prices AT&T and Sprint assert a newfound willingness to offer -- are 25% higher than the prices to which U S WEST has committed. Joint Petition at 9. It also remains true, just as it was when the Joint Petition was filed, *see* Decker Decl. ¶ 9, that neither AT&T, Aliant, nor any other carrier has come forward with a better price for these interLATA links. Nor is there any assurance that they would do so in the event the Commission denied the Joint Petition; if U S WEST were no longer a factor, IXCs would have no incentive to offer the State a competitive price or to improve existing network services.

16/ AT&T Comments at 2 n.1, 8.

17/ *See SWBT Modification Order* ¶ 13; *ELCS Order* ¶ 18.

18/ *See* AT&T Comments at 6; Sprint Comments at 3-4; McLeod Comments at 8-9.

Granting the Joint Petition not only would result in considerable savings for the State by allowing the replacement of existing 56K (or 9.6K) links with U S WEST-provided links of the same capacity, but would permit the State to upgrade the capacity of key links and thereby introduce much-needed services to the northeastern region. As Ameritech notes, "[g]ranting the Petition would enable state, local and tribal government officials to more effectively provide a broad range of services to communities in the area described, in which citizens are currently deprived of access to these services 'simply because they live on the wrong side of a LATA boundary.'" Ameritech Comments at 2 (quoting Joint Petition at i). Such services include programs relating to employment, welfare, and law enforcement, as well as distance learning and telemedicine provided via public videoconferencing sites. Joint Petition at 16-17; Decker Decl. ¶ 16.

U S WEST alone has proposed affordable pricing for upgraded T-1 frame connections that cross the LATA boundary. AT&T now professes an interest in doing so. AT&T Comments at 7. That interest illustrates no more than that U S WEST's entry into a previously closed market has *spurred* competition, rather than diminished it. AT&T notably fails to describe the facilities it asserts a willingness to provide. And, as noted, even if AT&T does come up with a competitively priced plan, there is no assurance that it would follow through if the Commission were to deny the Joint Petition. For that reason, and because AT&T has not even proposed revisiting its refusal to provide public NNIs, the Commission should disregard AT&T's eleventh-hour maneuvering. The public interest would not be served by preventing the State from improving its data network by purchasing frame links from U S WEST simply because AT&T *might* someday offer a competitive alternative. Conversely, if AT&T were to present a service

plan that met the all of the State's needs, the State certainly would consider purchasing services from AT&T notwithstanding the Commission's grant of the Joint Petition.

B. Opponents Fail To Show Any Significant Threat to Competition.

AT&T, Sprint, and McLeod fare no better in attempting to portray the relief sought in the Joint Petition as anticompetitive. Plainly, authorizing U S WEST to carry a small amount of data traffic, for a single customer, in a narrowly defined geographic area, would neither harm local competition nor diminish U S WEST's incentive to pursue full-scale interLATA relief under section 271.[19/] Indeed, if the Joint Petition posed any threat to competition, the State would not have been a party to it.

The relief sought in the Joint Petition is simply too narrow to substitute for section 271 approval and thus does not undercut U S WEST's incentives to meet the section 271 checklist in Nebraska. The proposed relief would not allow U S WEST to provide interLATA voice services, carry data traffic between LATAs other than the Omaha and Sioux City LATAs, serve customers other than the State of Nebraska, or even carry data for the State off the State Network. While AT&T asserts that "U S WEST would have every reason to convert what is today circuit-switched voice traffic into IP telephony so as to expand the scope of the relief,"[20/] this maneuver is not within U S WEST's power, as AT&T well knows: It is up to the *customer* to decide whether to transmit voice calls over a data network. The State does *not* plan to use the State Network for basic voice services, and approval of the proposed relief would not affect the State's choice of an

---

19/ *See SWBT Modification Order* ¶ 13 ("the potential for harm is minimal due to the limited scope of [the] request"); *ELCS Order* ¶ 18(proposed modification "involves only a small number of customers [and] access lines" and therefore would not harm competition).

20/ AT&T Comments at 4 n.7, 12.

interLATA voice carrier. Decker Decl. ¶ 17. As the Joint Petition indicates, U S WEST wants to be able to provide the full range of interLATA services in Nebraska, and it therefore already has applied to the Nebraska public service commission under section 271 for full interLATA relief. U S WEST has no intention of abandoning this application for full relief simply because it is permitted to provide the State with a handful of data links in an isolated corner of Nebraska. As the Commission has properly recognized, limited-purpose relief of the sort petitioners propose is incapable of having a "significant anticompetitive effect on . . . the BOCs' incentive to open their own markets." *ELCS Order* ¶ 18.

Notwithstanding this finding, McLeod uses its comments as a platform to launch unfounded and irrelevant allegations about the openness of Nebraska's local exchange markets. *See* McLeod Comments at 9-10. Contrary to the suggestion that U S WEST has engaged in anticompetitive conduct, *id.* at 9, U S WEST in fact has opened its markets to competitors. Indeed, Aliant has entered both the residential and business markets in Omaha and Grand Island; Cox Communications serves both residential and business customers in Omaha; FirstTel resells local exchange service to business and residential customers throughout U S WEST's service territory in Nebraska; and TCG has made preparations to serve customers in Omaha.[21/] To the extent that McLeod's statistics regarding the low number of voice grade lines purchased by competitors from U S WEST have any significance here, they demonstrate that new entrants have shown little interest in entering rural areas such as those in Nebraska -- particularly in the northeast region.

21/ *See* Rebuttal Testimony of Dr. Robert G. Harris, *Investigation of U S WEST Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Docket No. C-1830, at 3-4 (Sept. 30, 1998).

AT&T's contention that granting the Joint Petition would impede competition in the long distance market also is based on a faulty premise. AT&T asserts that "any interLATA price advantage U S WEST would enjoy could only come from cross-subsidization funded by its captive local ratepayers." AT&T Comments at 12. In fact, as the Joint Petition makes clear, the rates U S WEST has committed to offer are above cost, and would not be subsidized by rates for any other service. Joint Petition at 9 n.6. Petitioners suspect that AT&T is forced to resort to baseless charges of cross-subsidization to mask the fact that its own rates for private line and frame relay service in northeast Nebraska are inflated. Far from harming competition, granting the Joint Petition would be *pro*competitive, as evidenced by AT&T's alleged newfound interest in offering more affordably priced data links.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Joint Petition, the Commission should approve the proposed targeted interLATA relief to permit U S WEST to connect State Network sites in northeastern Nebraska to network facilities in Omaha.

Respectfully submitted,

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March 22, 1999

CERTIFICATE OF SERVICE

I certify that on March 22, 1999, copies of the Reply Comments of State of Nebraska and U S WEST Communications, Inc., in NSD-L-99-04, have been served by hand on the parties listed below.

Matthew A. Brill

Gregory Cooke
Network Services Division
Federal Communications Commission
2000 M Street, N.W.
Washington, DC 20554

Alan Thomas
Network Services Division
Federal Communications Commission
2000 M Street, N.W.
Washington, DC 20554

International Transcription Services
2100 M Street, N.W., Suite 140
Washington, DC 20037

FCC Form 477 -- Local Competition and Broadband Reporting

Please complete separate surveys for the following types of operations and check the appropriate box to indicate which type you are reporting on this form.

ILEC ☐ Mobile Wireless / Satellite Service Provider ☐ CLEC ☐ Cable TV ☐ Other ☐

Company

State

Qtr ☐ Year

I. Voice grade lines 1/ 2/ in service at end of quarter.

	Voice Grade and Equivalent Lines 2/			
	Residential Switched (a)	Non-Residential Switched 5/ (b)	Special Access and UNE Loops 5/ (c)	Total Voice Grade Lines [(a) + (b) + (c)]
A. Lines you used to provide service to end users, 3/ categorized by:				
1. Lines you owned. 4/			(must be special access)	
2. Lines you leased. 4/			(must be special access)	
3. Total lines you provided to end users. [Line 1 + Line 2]			(must be special access)	
B. Lines you provided to other communications carriers, 3/ categorized by:				
4. Lines you owned 4/ that you provided under a UNE loop arrangement, defined in 47 U.S.C. §251. 5/			(must be UNE loop)	
5. Lines you owned 4/ that you provided under a wholesale (Total Service Resale) arrangement, defined in 47 U.S.C. §251. 5/			(must be special access)	
6. Lines you owned 4/ that you provided under other resale arrangements, such as centrex provided at retail rates for resale. 5/			(must be special access)	
7. Lines that you leased 4/ that you in turn provided under UNE, wholesale, or other resale arrangements.			(special access + UNE loop)	
8. Total lines that you provided to other communications carriers. [Line 4 + Line 5 + Line 6 + Line 7]			(special access + UNE loop)	
C. 9. Total voice grade lines. [Line 3 + Line 8]			(special access + UNE loop)	

10. Contact Person:

11. Contact Telephone #:

OMB NO: 3060-xxxx
EXPIRATION DATE:

Company

State

II. Total voice grade lines 1/ 2/ that you owned 4/ that were in service at end of quarter, categorized by status of your switching center.

	Switching Center Information			
	Residential Switched (a)	Non-Residential Switched 5/ (b)	Special Access and UNE Loops 5/ (c)	Total Voice Grade Lines [(a) + (b) + (c)]
12. Lines in your switching centers where at least one competing communications carrier had an operational collocation arrangement for switched local exchange services.				
13. Lines in your switching centers where no competing communications carrier had an operational collocation arrangement for switched local exchange services.				
14. Total. [Line 12 + Line 13] [also equals Line 1 + Line 4 + Line 5 + Line 6]				

III. High capacity lines 1/ 2/ in service at end of quarter.

	High Capacity Lines 2/			
	Number of Physical Lines/Channels in Service		Capacity of Lines/Channels in Service	
	(a) T1/T3	(b) Other	(c) T1/T3 (1.544 mbps equivalents)	(d) Other (1.544 mbps equivalents)
A. Lines you used to provide service to end users, 3/ categorized by:				
15. Lines you owned. 4/				
16. Lines you leased. 4/				
17. Total lines you provided to end users. [Line 15 + Line 16]				
B. 18. Total lines that you provided to other communications carriers.				
C. 19. Total high capacity lines you provide. [Line 17 + Line 18]				

OMB NO: 3060-xxxx
EXPIRATION DATE:

Company

State

IV. Lines and channels 1/ that you used to provide service to your end users at end of quarter, categorized by technology:

	Number of One-Way and Full Broadband 7/ Lines/Channels connected to All End User 3/ 5/ Customers			
	(a) One-Way Broadband Provided Over Own Facilities	(b) One-Way Broadband Provided Over Resold Facilities	(c) Full Broadband Provided Over Own Facilities	(d) Full Broadband Provided Over Resold Facilities
20. T1.				
21. T3.				
22. Up to T1 equiv. xDSL. 8/				
23. Greater than T1 equiv. xDSL. 8/				
24. Up to T1 equiv. coaxial (including fiber-fed). 8/				
25. Greater than T1 equiv. coaxial (including fiber-fed). 8/				
26. Optical carrier.				
27. Up to T1 equiv. electrical power line. 8/				
28. Greater than T1 equiv. electrical power line. 8/				
29. Up to T1 equiv. satellite fixed. 8/				
30. Greater than T1 satellite fixed. 8/				
31. Satellite mobile.				
32. Up to T1 equiv. terrestrial wireless fixed. 8/				
33. Greater than T1 terrestrial wireless fixed. 8/				
34. Terrestrial wireless mobile.				
35. Other -- up to T1 equiv. 8/				
36. Other -- greater than T1 equiv. 8/				

Company

State

V. Lines and channels [1] that you used to provide service to your end users at end of quarter, categorized by technology:

	Number of One-Way and Full Broadband [7] Lines/Channels connected to Residential [3] [5] Customers			
	(a) One-Way Broadband Provided Over Own Facilities	(b) One-Way Broadband Provided Over Resold Facilities	(c) Full Broadband Provided Over Own Facilities	(d) Full Broadband Provided Over Resold Facilities
37. T1.				
38. T3.				
39. Up to T1 equiv. xDSL. [8]				
40. Greater than T1 equiv. xDSL. [8]				
41. Up to T1 equiv. coaxial (including fiber-fed). [8]				
42. Greater than T1 equiv. coaxial (including fiber-fed). [8]				
43. Optical carrier.				
44. Up to T1 equiv. electrical power line. [8]				
45. Greater than T1 equiv. electrical power line. [8]				
46. Up to T1 equiv. satellite fixed. [8]				
47. Greater than T1 satellite fixed. [8]				
48. Satellite mobile.				
49. Up to T1 equiv. terrestrial wireless fixed. [8]				
50. Greater than T1 terrestrial wireless fixed. [8]				
51. Terrestrial wireless mobile.				
52. Other -- up to T1 equiv. [8]				
53. Other -- greater than T1 equiv. [8]				

Company

State

VI. Voice grade mobile telephony service subscribers 1/ 9/ served at end of quarter:	Mobile Service Total Subscribers
54. Cellular.	
55. PCS & other mobile telephony.	
56. Total. [Line 54 + Line 55]	

on about the deployment of broadband
asis. Carriers
uld file separate data for residential,

s. In categorizing lines as voice grade vs.
on the portion of the line or channel that
Sections) and lines that you provide to

er premises at one end and, at the other
or example:

ide service to end users.

or circuit switched networks whence

d thence connected to another

.]
you already are reporting the portion of the
capacity lines between your switching

lude dedicated lines that customers

ser customers. For example:

cess provided

MB NO: 3060-xxxx
XPIRATION DATE:

2/ Voice grade vs. high capacity: Count as one voice grade equivalent line: traditional analog POTS lines, Centrex-CO extensions, and Centrex-CU trunks. Count a UNE loop as a single voice grade equivalent line unless it is specifically provided and equipped as a high capacity line. Classify high capacity lines/channels as T1/T3 vs. all other. Include DS1 and DS3 lines as T1/T3 lines/channels. Include xDSL, coaxial, optical carrier, electrical power, terrestrial fixed wireless and satellite fixed lines/channels as other lines/channels. In completing Section III, report actual line counts and capacity. For example, count eight 1/4 T1 circuits as eight physical lines and as two 1.544 mbps equivalents of capacity. Similarly, count one optical carrier (SONET) OC-1 line as one physical line and as twenty eight 1.544 mbps equivalents. Count a T3/DS3 line as one physical line and as twenty eight 1.544 mbps equivalent lines. Count a PRI ISDN line as one 1.544 mbps equivalent line. Classify other digital lines as follows:

	Reporting of Digital Lines/Channels			
	Upstream Data Rate			
Downstream Data Rate	Less than 48 kbps	48 kbps or more but less than 96 kbps	96 kbps up to 200 kbps	More than 200 kbps
Less than 48 kbps	do not report	do not report	do not report	one-way broadband
48 kbps or more but less than 96 kbps	do not report	one voice grade *	one voice grade *	high capacity and one-way broadband
96 kbps up to 200 kbps	do not report	one voice grade *	two voice grade *	high capacity and one-way broadband
More than 200 kbps	one-way broadband	high capacity and one-way broadband	high capacity and one-way broadband	high capacity and full broadband

* As noted above, digital lines are reported as voice grade lines only if they connect directly to an end-user premises at one end and, at the other end, to a carrier switch or to a network that carries traffic to the public switched telephone network. For example, Basic Rate ISDN lines are reported as two voice grade lines.

3/ End-user vs. carrier: In Section I, separate lines provided to end users from lines provided to other communications carriers under resale or UNE arrangements. In Section III, separate high capacity lines that are connected to end users into two categories: lines that you provided to end users; and lines that you provided to other communications carriers. Do not include the same high capacity line more than once in lines 15, 16 and 18. Include as end-user lines in Section I-A and Section III-A lines billed or marketed by your agents. For example, include as end-user lines all lines provided through traditional marketing agency arrangements, as well as lines furnished to shared tenant service providers. In Sections IV and V, only report broadband services provided to end users. Broadband lines provided to internet service providers for resale to end users should be classified as resale, not as end-user.

4/ Own vs. lease: Only one filer should report that they own any specific line. Count as lines you own all lines that you actually owned as well as lines obtained from entities that are not communications carriers and that you used as part of your own system. Count as lines you lease all lines that you obtained from another reporting communications carrier including lines obtained under UNE loop, wholesale (Total Service Resale), or other resale or lease arrangements. For example, if you take a voice grade UNE loop and use it to provide switched access service to a residential customer, report that line in Line 2, column (a).

5/ Residential vs. non-residential vs. special access and UNE loop: Classify lines as residential only if the line terminates with a residential end user. Exclude lines that terminate with business, government, education, shared tenant system, institutional and pay telephone customers. In Section I, classify all lines provided under UNE loop arrangements in column (c). Count a UNE loop as in service if it has been provided to and is being billed to the competing carrier regardless of whether that carrier has the line in service. Classify lines provided for resale as residential vs. non-residential according to the tariff/price list under which the service is provided. If the tariff/price list does not distinguish residential vs. non-residential service, estimate a split based on the demographics of the area in which the lines are provided. Include local private lines connecting an end user with a carrier in column (c). For reporting voice grade lines, classify as special access all dedicated lines connected to an end user at one end, passed through your switch or switching center, and thence connected to another communication carrier's switch or network, even if these were provided under private line rather than special access tariffs. Report high capacity lines in Section III without any separate breakout for switched vs. special access vs. private line. In Section V, include lines that connect to residential end users including lines billed to residential end users that connect the customer to an internet service provider, but not lines billed to the internet service provider.

6/ A switching center is a location containing one or more switches. Do not consider separate three-digit telephone prefixes as separate switching centers. Consider a remote as a separate switching center if a competing carrier could obtain a UNE loop only at the remote switch rather than at the host switch. Note: this definition of a switching center is different from wire center based definitions of switching centers which include all remote switch locations as switching centers. If collocation occurs only at a remote switch, report lines served from that switch on Line 12 and report other lines served by the host or other remote switches on Line 13.

7/ One-way vs. full broadband: Classify a line/channel as full broadband if it provides the customer the capability of simultaneously sending and receiving information at a rate greater than 200 kbps. Classify an asymmetric line/channel as one-way broadband if it provides the customer the capability of sending or receiving information at a rate greater than 200 kbps in one direction but 200 kbps or less in the other direction. For packet switched-based services, use the customer's authorized maximum usage to classify the line/channel as full broadband or one-way broadband. As noted in footnote 1, broadband does not include broadcast cable TV service or other exclusively one-way services, but does include internet access using cable modem service over cable systems.

8/ Up to vs. greater than T1 equiv. broadband: In Sections IV and V, classify xDSL, coaxial, electrical power, satellite fixed, wireless fixed and other lines/channels as greater than T1 equivalent if they provide the end user with the capability of transmitting or receiving greater than 1.544 mbps in one direction. Classify other broadband lines/channels as up to T1 equivalent.

9/ Mobile wireless telephony subscriber counts by state should be based on billing addresses.

FCC Form 477 -- Local Competition and Broadband Reporting

Company

State

Space for comments or explanatory notes.

Line	Comment

OMB NO: 3060-xxxx
EXPIRATION DATE:

Instructions for electronic filing

1) Enter the data for one state, save the spreadsheet, and then reload FORM5XX.XLS to create a file for the next state.

2) If you meet the filing threshold for more than one type of operation (CLEC, ILEC, Mobile Wireless / Satellite Service Provider, Cable TV, or Other) then you will file separate data in separate worksheets for each type of operation in each state.

3) Use the following naming convention for file names:

First letter = "C" for CLEC operations in state; "I" for ILEC operations;
"M" for Mobile Wireless / Satellite operations; "V" for cable TV operations; or
"O" for other operations in the state.

Next character is the last digit of the year. For example:

1999	9
2000	0

Next three letters = entity name (company) abbr. For example:

Allegiance Telecom	ALG
ALLTEL	ALL
Ameritech	AMR
e.spire Communications	ESP

Next character is the numeric value of the quarter of the filing. Specifically:

first quarter	1
second quarter	2
third quarter	3
fourth quarter	4

Next two characters = state abbr.

Alabama	AL
Alaska	AK
Arizona	AZ
Arkansas	AR
California	CA
Colorado	CO
Connecticut	CT
Delaware	DE
District of Columbia	DC
Florida	FL
Georgia	GA
Hawaii	HI
Idaho	ID

Illinois	IL
Indiana	IN
Iowa	IA
Kansas	KS
Kentucky	KY
Louisiana	LA
Maine	ME
Maryland	MD
Massachusetts	MA
Michigan	MI
Minnesota	MN
Mississippi	MS
Missouri	MO
Montana	MT
Nebraska	NE
Nevada	NV
New Hampshire	NH
New Jersey	NJ
New Mexico	NM
New York	NY
North Carolina	NC
North Dakota	ND
Ohio	OH
Oklahoma	OK
Oregon	OR
Pennsylvania	PA
Puerto Rico	PR
Rhode Island	RI
South Carolina	SC
South Dakota	SD
Tennessee	TN
Texas	TX
Utah	UT
Vermont	VT
Virginia	VA
Washington	WA
West Virginia	WV
Wisconsin	WI
Wyoming	WY

Examples:

Ameritech ILEC operations in Michigan (fourth quarter, 1999)	I9AMR4MI
GTE CLEC operations in Florida (second quarter, 2000)	C0GTE2FL

4) Do not insert or delete rows or columns or move cells in the worksheet.

5) Enter data into the cells indicated.

6) Enter numeric data as numbers, not as labels. Enter all digits, even if a number has been estimated or rounded. Thus, enter 21.7 million as 21,700,000.

Enter quarter as a numeric value
1 = first quarter (i.e., data as of March 31)
2 = second quarter (i.e., data as of June 30)
3 = third quarter (i.e., data as of September 30)
4 = fourth quarter (i.e., data as of December 31)

Enter the year as a numeric, 4-digit value. For example: 2001

7) Enter any comments or explanatory notes in the space provided at the bottom of the worksheet, below the footnotes. Enter the section and/or question number in column F and your comment in column I.

8) Enter the identical company name in the space provided at the top of FCC Form 5xx for each state for which the entity files data for a particular type of operation (e.g., CLEC). Use the name under which the company does business, not the abbreviation used for naming the data files.

Enter the state abbreviations shown above in the indicated cell under the company name.

9) Enter an "x" or an "X" in the appropriate check box to indicate CLEC; ILEC; Mobile Wireless / Satellite Service Provider; Cable TV; or Other.

10) Entering responses: Do not leave entries blank. Use the number "0" (zero) for items that are not applicable or for those values which are known to be zero.

11) Contact Ellen Burton or Jim Zolnierek for clarifications at (202) 418-0940.

OMB NO: 3060-xxxx
EXPIRATION DATE:

12) To submit the individual data files, either:

a) Attach files to an e-mail directed to:
localcomp@fcc.gov

Include in the message part of the e-mail
- The name of the company providing the data
- The number of files attached to the message
- The 3-character company abbreviation used as part of the file names.

or b) Mail diskettes to:

Local Competition Survey
Mail Stop 1600F
Federal Communications Commission
445 12 th Street, S.W.
Washington, D.C. 20554

Include in the cover letter transmitting the diskettes:
- The name of the company providing the data
- The number of diskettes and data files transmitted in the package
- The 3-character company abbreviation used as part of the file names.

Note: more than one file can be included on a diskette.

EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of U S WEST Communications, Inc.	)
for Relief from Barriers to Deployment	)
of Advanced Telecommunications Services	)

PETITION FOR RELIEF

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Counsel for U S WEST Communications, Inc.

February 25, 1998

SUMMARY

U S WEST Communications, Inc. ("U S WEST") files this Petition for Relief pursuant to 47 C.F.R. §§1.1, 1.3, and 1.401, as well as Section 706 of the Telecommunications Act of 1996. U S WEST respectfully asks the Commission to forbear from imposing certain regulatory restrictions that frustrate the deployment to rural America of advanced telecommunications capabilities. In particular, U S WEST asks the Commission (1) to allow it to build and operate packet- and cell-switched data networks across LATA boundaries, (2) to permit it to carry interLATA data traffic incident to its provision of digital subscriber line services, (3) to forbear from requiring U S WEST to unbundle for its competitors the non-bottleneck network elements used to provide these data services, and (4) to forbear from requiring U S WEST to make these competitive services available at a wholesale discount for resale. Expedited consideration is requested.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of U S WEST Communications, Inc.	)
for Relief from Barriers to Deployment	)
of Advanced Telecommunications Services	)

PETITION FOR RELIEF

U S WEST Communications, Inc. ("U S WEST") respectfully petitions the Commission to forbear from imposing certain regulatory restrictions that frustrate the deployment to rural America of advanced telecommunications capabilities such as digital subscriber line technologies and data networking services. In particular, U S WEST asks the Commission (1) to allow it to build and operate packet- and cell-switched data networks across LATA boundaries, (2) to permit it to carry interLATA data traffic incident to its provision of xDSL services, (3) to forbear from requiring U S WEST to unbundle for its competitors the non-bottleneck network elements used to provide these data services, and (4) to forbear from requiring U S WEST to make these competitive data services available at a wholesale discount for resale. Granting this petition will allow U S WEST to expand its data offerings in a way that will increase the services available to the public and enhance the ability of all information service providers to offer advanced services, while also enabling competitive providers of data telecommunications to use U S WEST's underlying transmission facilities to serve their customers. U S WEST files this petition pursuant to 47 C.F.R. §§ 1.1, 1.3, and 1.401, as well as Section 706 of the Telecommunications Act of 1996. Expedited consideration is requested.

PRELIMINARY STATEMENT

The primary goal of the Telecommunications Act, as stated in its title, is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). To this end, Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and authorized it to use "regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment." Act § 706(a), codified at 47 U.S.C. § 157 note (emphasis added). The Act requires the agency to determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and, if not, the Commission must "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition." Act § 706(b) (emphasis added).

Congress's references to securing these advanced technologies for "all" Americans were deliberate. Congress recognized that rural areas of the country do not currently have the same access to telecommunications services as urban areas, and that economic barriers and low population densities make it more difficult to deploy advanced services and technologies in smaller communities. Accordingly, the Act expresses a special concern that rural Americans not be left behind: "Consumers in all regions of the Nation, including . . . those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas." 47 U.S.C. § 254(b)(3). See also id.

§ 254(b)(2) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation.") (emphasis added).

U S WEST is uniquely positioned to invest in the infrastructure needed to bring advanced data telecommunications and information services to "all Americans," including residential and small-business customers, and those in harder-to-reach smaller and rural communities. It has proven itself willing and able to serve these markets. U S WEST has made by far the greatest investment in telecommunications infrastructure of any carrier in its largely rural region. It is currently rolling out advanced high-bandwidth copper-loop technologies on an aggressive schedule throughout the fourteen states in which it is an incumbent local exchange carrier. Outside that region, where the restrictions that are the subject of this petition do not apply, U S WEST has demonstrated its capability to provide customers with a full range of advanced communications, networking, and information services, and its determination to compete for the opportunity to do so.

But regulatory barriers prevent U S WEST from doing much of what it could accomplish. In its own region, U S WEST is barred outright from some advanced-service markets that would benefit enormously from new entry; for example, even though smaller communities' links to the internet are low-bandwidth and usually congested, U S WEST is not allowed to compete to provide regional internet backbone services because it may not carry data traffic across LATA boundaries. Other regulatory burdens often make it prohibitively expensive for U S WEST to deploy advanced technologies and service in rural areas, even where it is allowed to do so; for example, it may never make economic sense for U S WEST to deploy the equipment needed to provide digital subscriber line services in thinly populated areas if it cannot

aggregate data traffic from different LATAs over its own facilities. Still other regulations, such as the Commission rules which can be read to apply the Act's unbundling and resale provisions to competitive new offerings, operate to blunt U S WEST's incentives to develop and invest in advanced technologies by requiring it to turn its innovations over to competitors risk-free at prices that may not even allow the company to recover its development costs, let alone realize the returns that normally follow successful innovation in a competitive market. U S WEST now asks the Commission to use its statutory authority to remove these barriers, and thereby carry out Congress's promise to "all Americans," including residential and rural customers.

U S WEST asks for relief from four particular regulatory burdens: the bar on building and operating cell- and packet-switched data networks that cross LATA boundaries, restrictions on interLATA data transport incident to providing digital subscriber line services, unbundling obligations for non-bottleneck data facilities, and duties to offer competitive data services to resellers at a discount.[1/] U S WEST notes that the regulatory relief it seeks in this petition is targeted and limited. U S WEST is not asking here for complete deregulation of these technologies, nor does it seek to avoid its obligation to make bottleneck facilities (such as the local loops over which digital subscriber line services operate, or central-office collocation space) available to its CLEC competitors. However, there are many other Commission rules originally designed to govern incumbent carriers' traditional circuit-switched offerings that

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1/ As described in greater detail below, many of these services do not fit within the definition of "telephone exchange service," and accordingly would not be covered by the Act's unbundling and discounted resale language. The blanket waiver sought here would eliminate the uncertainty caused by the failure of the Commission's rules to distinguish between incumbent LECs' traditional "telephone exchange service" offerings and their advanced data offerings, an uncertainty that itself hinders the deployment of advanced technology and services.

should not be applied to their offerings of advanced data services, and U S WEST will in the future request forbearance from enforcement of these other regulations on the ground that they are unnecessary to ensure reasonable pricing or avoid discrimination in a competitive market. See 47 U.S.C. §§ 160, 161. Here, however, it seeks only the limited regulatory relief necessary to advance the deployment of specific data networking and transmission services in its region.

The relief requested herein will further the development of competition in the markets for internet access and other data networking services. U S WEST is committed to providing its data services in a manner that increases customers' choices of service providers, even in smaller communities. U S WEST currently offers the data telecommunications services discussed in this petition on an equal basis to all internet service providers ("ISPs"), including U S WEST's own internet access service. If relief is granted, end users will be able to enjoy the full benefits of U S WEST's expanded data services whether they subscribe to U S WEST's internet access service or an unaffiliated ISP. U S WEST will also continue to make unbundled conditioned loops and collocation space available at cost-based prices to ensure that competitive carriers can provide their own data telecommunications services to customers. For these reasons, granting the relief requested would not only benefit U S WEST's residential and business local exchange subscribers, but would also dramatically improve the ability of competing ISPs and carriers in U S WEST's region to offer high-bandwidth services, in both respects speeding the deployment of advanced services to rural consumers.

BACKGROUND

U S WEST and Its Region

U S WEST's fourteen-state region encompasses some of the most sparsely populated areas in the country and the most rugged terrain in the continental United States. U S WEST's 1,266 wire centers serve 284,000 square miles of territory. Thirty-five of these wire centers serve an area larger than 1,000 square miles each; together, they serve 59,000 square miles, or almost 21%, of U S WEST's total service area. These wire centers average a mere 3.71 residential loops per square mile served. Ninety more wire centers serve areas ranging from 500 to 1,000 square miles each, together representing another 61,600 square miles, or almost 22% of U S WEST's territory; on average, these wire centers serve only 10.7 residential loops per square mile. Data from the Commission's Industry Analysis Division confirm this picture of U S WEST's region: U S WEST serves five of the ten states requiring the greatest monthly per-loop universal service support payments, and eight out of the top twenty.[2/]

U S WEST's position in its region makes it the most likely company to deploy advanced telecommunications and information services on a widespread basis to rural America, as Congress intended. U S WEST is by far the largest local exchange carrier in its fourteen states, and it is required by law to serve virtually all of the residential and business customers in its service areas. In 1997 alone, U S WEST invested more than $1.9 billion of capital to construct, improve, upgrade, and repair the telephone network within its region. Moreover, it is committed to deploying advanced data networking and transmission services as broadly as

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2/ See Industry Analysis Division, Universal Support and Telephone Revenue by State, at 13 (Table 2: "USF High Cost Support"), Jan. 1998.

possible throughout its region, and its roll-out of these services has been the most aggressive of any local exchange carrier in the nation. The following examples illustrate what U S WEST has already accomplished in its region:

- **Frame relay services.** U S WEST's frame relay operations are the largest of any local exchange carrier in the nation and the third largest (behind AT&T and Sprint) overall. U S WEST has deployed over 350 frame switches across all 14 states of its region (the largest capital commitment of any carrier) and had over 47,000 customer ports at the end of 1997. It has built a statewide network in Utah (a single-LATA state) and LATA-wide networks in Oregon. U S WEST offers a complete range of access options, from 56 kilobits per second to DS-3.

- **Cell relay services/ATM.** U S WEST has deployed over 100 next-generation ATM switches across ten of its states. This technology builds on and is interoperable with U S WEST's frame relay services. The company is working with the State of Wyoming to build a statewide network to provide schools with ATM access. (Wyoming is also a single-LATA state.) U S WEST offers customers ATM access at speeds of up to DS-3 and OC-3.

- **Digital subscriber line technologies.** U S WEST recently announced the most aggressive roll-out of digital subscriber line services of any carrier in the country. As part of this roll-out, the company is currently deploying asymmetric digital subscriber line equipment in 226 central offices and wire centers in 43 cities across every one of its 14 states. Sales of these services will begin in April. U S WEST will offer users a complete range of access from 256 kilobits per second up to 7 megabits per second, with host-site connections as fast as 155 megabits per second.

As much as U S WEST has been able to achieve in its fourteen-state region, the company is capable of providing much more. Where U S WEST is not subject to the regulatory restrictions that apply to it in-region, the company is eager and able to provide customers with a full range of integrated, end-to-end data networking services. U S WEST was the first Bell company to offer out-of-region interLATA data transport services in competition with interexchange carriers' services. These include a "Super Port" service that combines local data transport with interLATA transport, internet services, operations support, equipment

maintenance, and systems integration services. To support these services, U S WEST has entered into alliances with Qwest and Williams Communications to build an intercity data transport network (the !nterACT network) that will cover the top 80 markets outside its region. This network will enable U S WEST to provide its customers with end-to-end solutions for all their data transport needs, and to guarantee the quality of its network services. Together, these activities confirm that U S WEST is willing and able to deploy the advanced communications and information services that Congress hoped to bring to "all Americans" and to "all regions of the Nation" by passing the Telecommunications Act.

High-Speed Data Networks and Smaller Communities

Smaller communities currently face an acute shortage of data bandwidth, especially (but not exclusively) the Transmission Control Protocol/Internet Protocol (TCP/IP) facilities that make up the "internet backbone" — the highest levels of the hierarchy of networks that collectively make up the internet.[3/] At the bottom are the millions of individual and corporate customers who subscribe to the retail access offerings of the thousands of ISPs nationwide.[4/] For the most part, these retail customers connect to their ISPs through dial-up

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3/ In light of the Commission's particular concern with ensuring that rural communities can connect to the "information superhighway," this discussion focuses on the scarce deployment of TCP/IP networks (i.e., internet backbone) in these areas. Section 706, however, directs the Commission to advance the deployment of "advanced telecommunications capability" more broadly, and is not limited to TCP/IP networks. The pace of deployment of these other data technologies (cell-switched and packet-switched networks) in rural communities likewise lags behind deployment in their urban counterparts, and for similar reasons.

4/ As shown in the illustration, there are actually several tiers of ISPs. In addition to serving retail end users directly, many large ISPs wholesale internet transit services to smaller (continued...)

access over the circuit-switched voice network or, for many corporate customers, via private lines. (Faster means of connecting, such as megabit-speed digital subscriber lines, are rapidly becoming available, and one aim of this petition is to accelerate the deployment of these high-bandwidth connections.) Each ISP, in turn, routes its subscribers' data traffic upward in the hierarchy to the network of a regional or national backbone provider, using a leased line that connects to the modem banks and routers that make up the backbone provider's local point of presence, or "PoP." The backbone provider carries this traffic between the nodes of its network on high-speed lines (with the fastest lines connecting the largest nodes of the network) and, if necessary, exchanges the traffic with other backbone providers at high-capacity internet exchange points. The traffic is then routed downward through the hierarchy to its destination.

The facilities that make up the internet backbone are not evenly distributed across the country. The high-speed links of the network — DS-3 links (45 megabits per second) and above — connect only the largest cities, leaving smaller communities behind. Illustrations 1-7 demonstrate this problem vividly.[5/] These maps show, for each of the largest backbone networks (PSINet, GTE/BBN, WorldCom, MCI, Digex, Sprint, and AT&T), which cities are connected to the internet with high-capacity (DS-3 or faster) PoPs.[6/] At best, each network has only a handful

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4/ (...continued)
ISPs, who in turn sell internet access to end users.

5/ This information is drawn from Boardwatch Magazine's February 1998 survey of TCP/IP backbones that are national in scope, peer at the major Network Access Points, and are connected with DS-3 or faster links. See http://www.boardwatch.com/ISP/backbone.html.

6/ There are a number of smaller nationwide backbone networks in addition to the ones listed. To the extent that these smaller providers operate high-speed PoPs in U S WEST's (continued...)

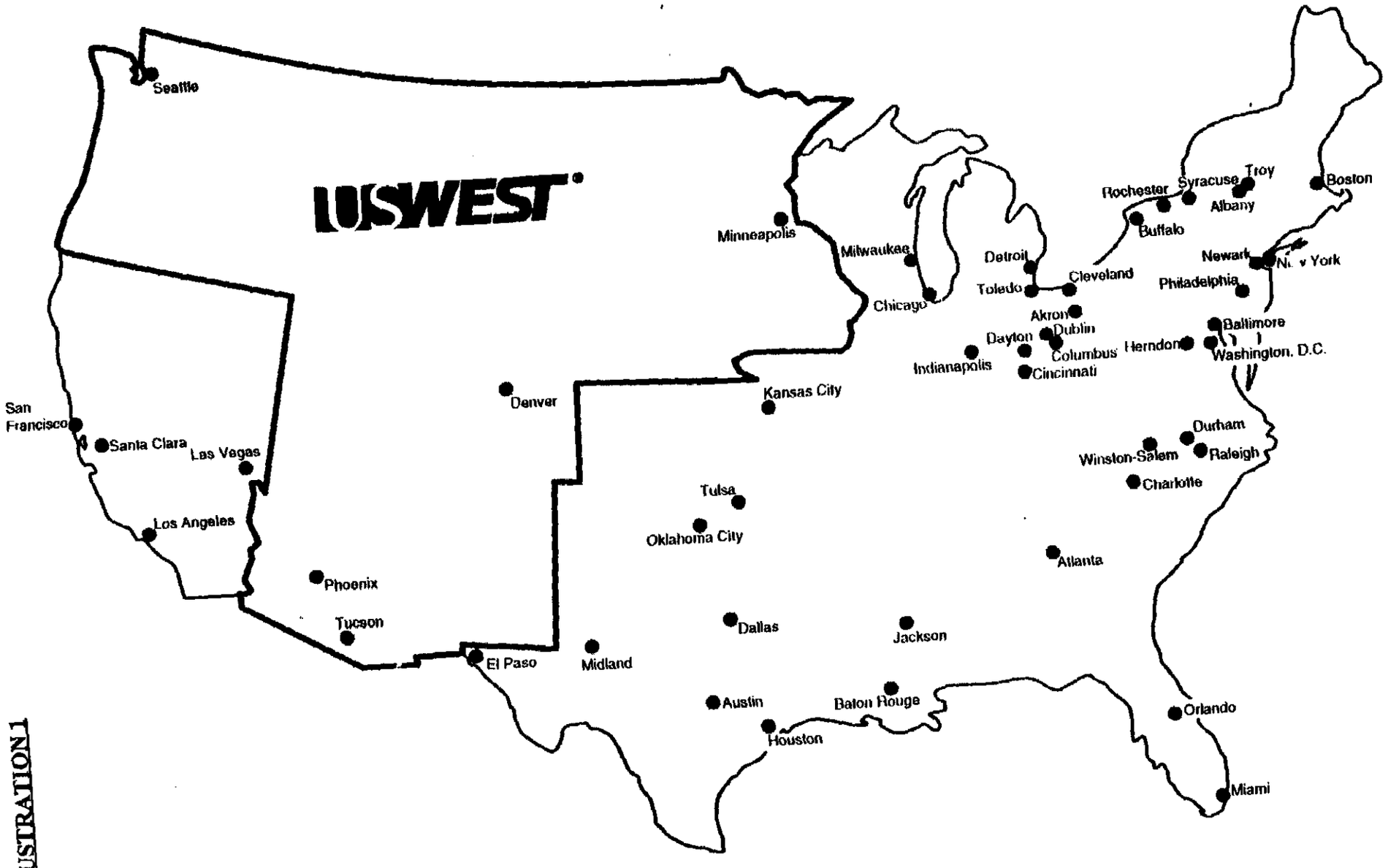

ILLUSTRATION 1

PSINet
45 Mbps DS3 Backbone Cities

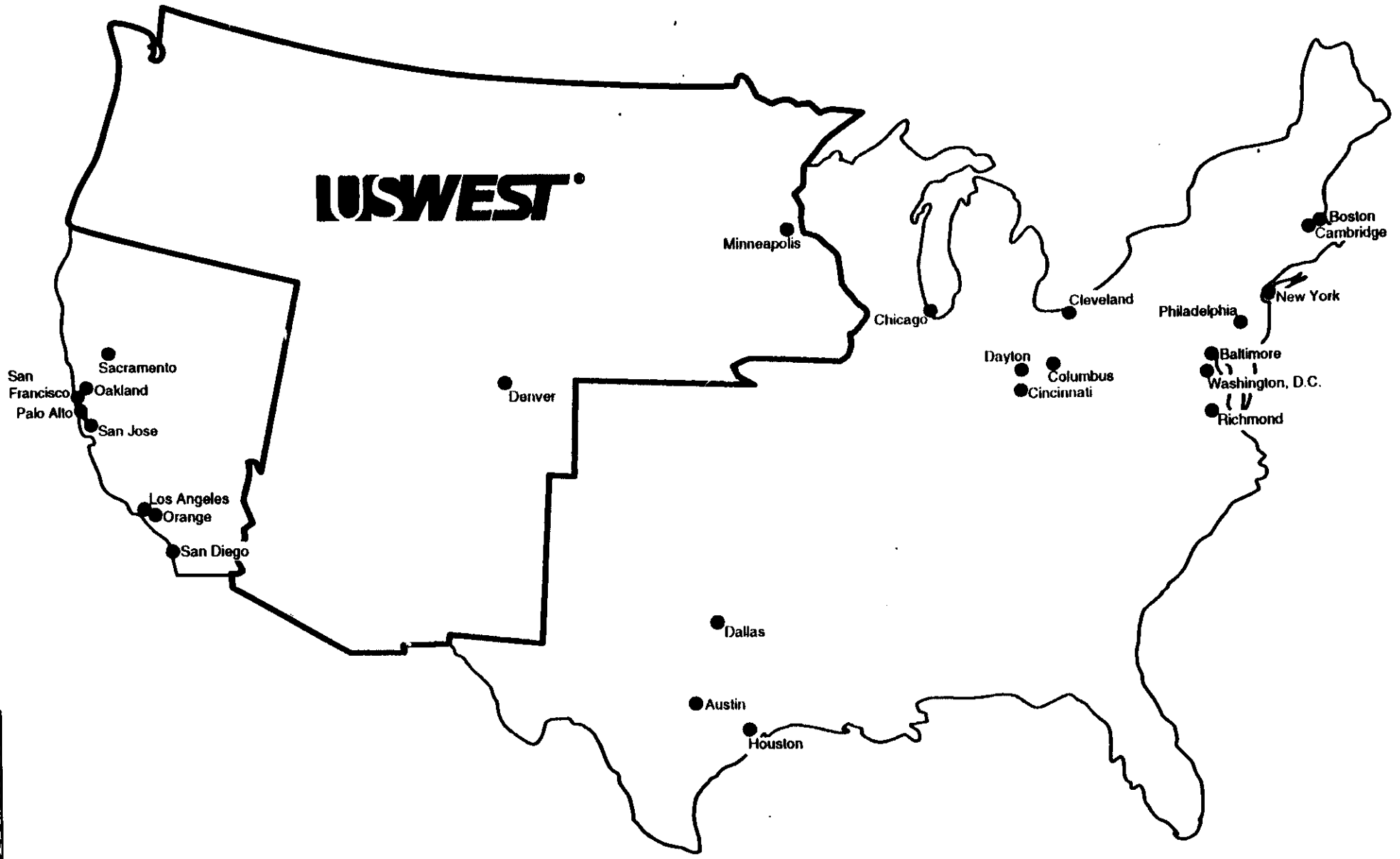

ILLUSTRATION 2

GTE Internetworking/BBN Planet
45 Mbps DS3 Backbone Cities

Source: Boardwatch

ILLUSTRATION 3

Worldcom, Inc./UUNET
45 Mbps DS3 Backbone Cities

Source: Boardwatch Magazine (2/98)

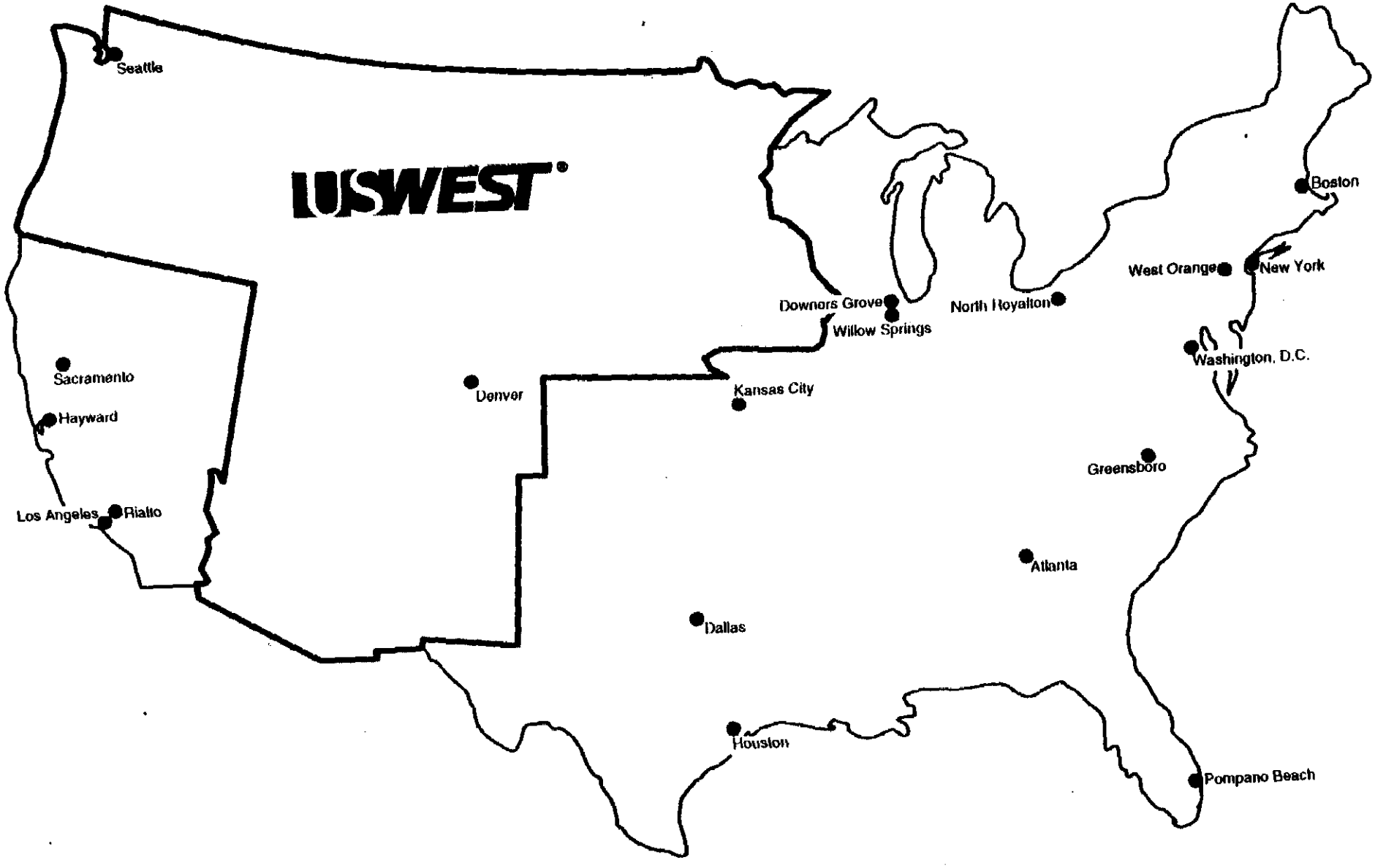

ILLUSTRATION 4

MCI – DS3 and Above Backbone Cities

Source: Boardwatch Magazine (2-98)

ILLUSTRATION 5

DIGEX – 45 Mbps DS-3 Backbone Cities

Source: Boardwatch Magazine (2-98)

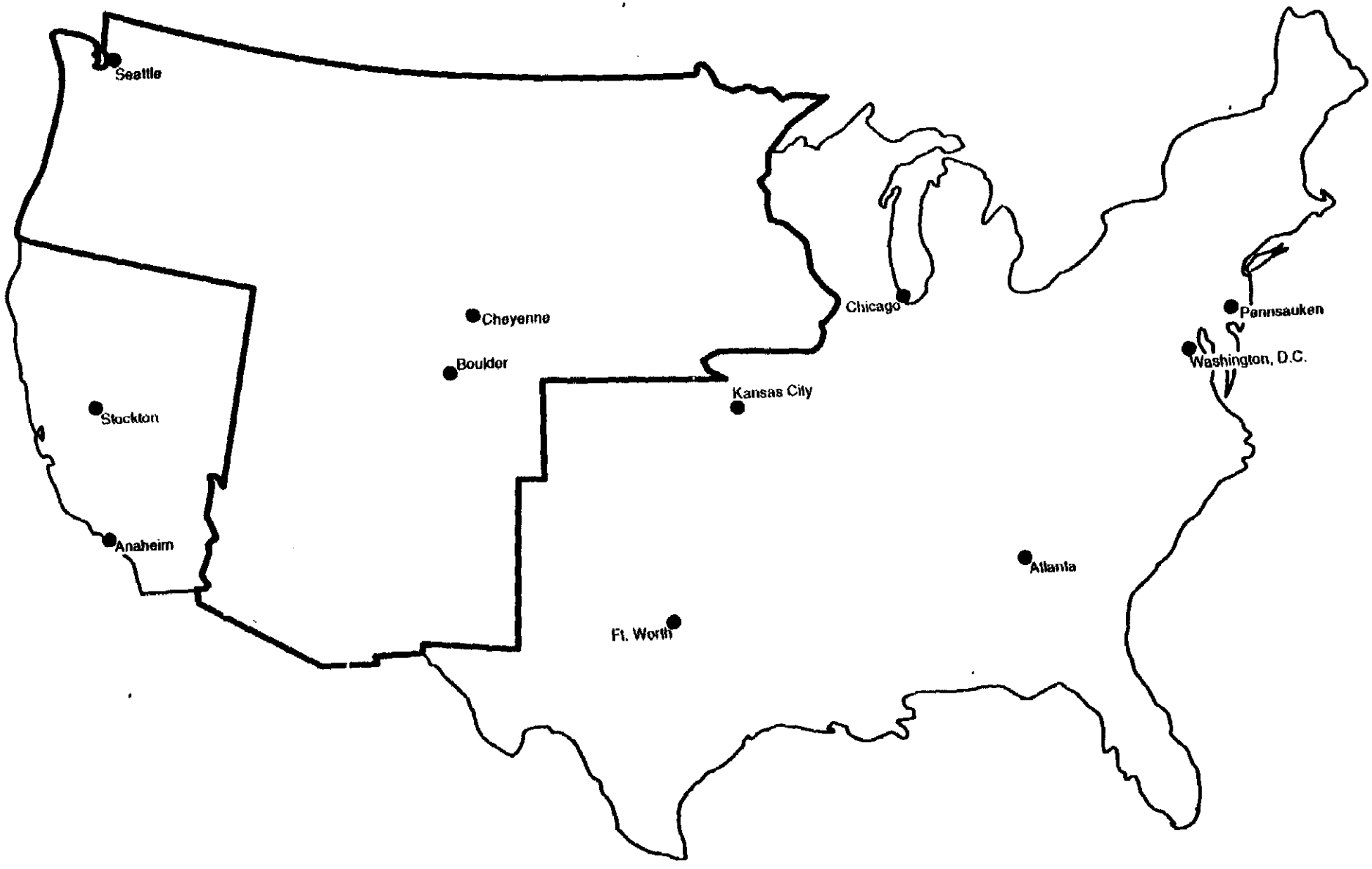

ILLUSTRATION 6

Sprint IP Services
45 Mbps DS3 Backbone Cities

Source: Boardwatch

ILLUSTRATION 7

AT&T
45 Mbps DS3 IP Backbone Cities

Source: Boardwatch Magazine (2-98)

of high-speed PoPs in U S WEST's region, leaving most of the fourteen-state region without high-speed service. Illustration 8 collects the largest seven networks on a single map, listing the number of national backbone providers serving each city with a DS-3 or faster PoP. Looking at this deployment LATA by LATA, as Illustration 9 does, demonstrates just how poorly the current backbone architecture serves rural America. Even when all thirty-eight national backbone providers for which there is publicly available information are considered, only nine of U S WEST's twenty-seven LATAs are served by more than one high-speed PoP, and seventeen of the twenty-seven are not served at all.[7/]

Unlike the larger cities shown on the maps, smaller communities in U S WEST's region are connected to the internet by slower links, typically 56 kilobit-per-second or DS-1 (1.54 megabits-per-second) lines. In addition, they are connected into the backbone lower in the hierarchy, meaning that they have more "hops" to the high-speed links of the internet, and their traffic is aggregated with proportionately more traffic from other sources than is the case higher in the hierarchy. Illustrations 10 and 11 show how an ISP in a large city such as Denver might be connected to the internet, and how this compares to the access that an ISP in a smaller city such as Sioux Falls, South Dakota would have. The ISP in Denver would almost surely be

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6/ (...continued)
region, however, they deploy them (with two exceptions) in the same large cities served by the biggest providers. The smaller networks do operate one additional high-speed PoP in Tacoma, Washington and another one in Santa Fe, New Mexico.

7/ If anything, Illustration 9 exaggerates the availability of high-speed links in smaller communities because U S WEST's LATAs are so large, sometimes covering entire states. For example, there is only one high-speed national backbone PoP in all of Wyoming (in Cheyenne); yet, because Wyoming is a single-LATA state, the map depicts the entire state as "served."

ILLUSTRATION 8

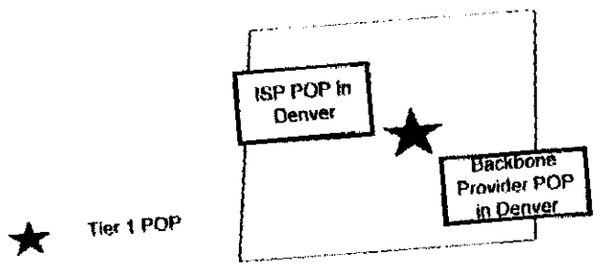
Number and Location of AT&T, DIGEX, GTE/BBN Planet, PSINet, Sprint IP Services, MCI and Worldcom/UUNET

Source: Boardwatch

ILLUSTRATION 9

Internet Access

Scenario # 1 : Internet Access in Larger Market



LOWER COSTS: Minimal if any additional facilities charge from ISP POP to backbone provider POP.

FEWER LIMITATIONS ON SERVICE: DS3 or higher capacity link availability to Internet backbone and more redundancy in the network.

ILLUSTRATION 10

ILLUSTRATION 11

Internet Access

Scenario # 2 : Internet Access in Smaller Market

HIGHER COSTS: Significant facility charges from Sioux Falls to Omaha (184 miles) or from Sioux Falls to Minneapolis (270 miles). The DS1 backhaul charges can be in excess of $1300 per month while DS3 backhaul charges can be in excess of $22,000 per month. Interlata relief would enable US WEST to eliminate these backhaul charges.

LIMITATIONS ON SERVICE: Even DSL customers may experience congestion and bottlenecks to the Internet over fractional DS1 lines and are vulnerable to single points of network failure.

located near at least one of the fourteen competing high-speed PoPs deployed in that city, and would have to pay for transport of its traffic over only a minimal distance to reach a DS-3 or faster connection. But to reach the higher levels of the backbone, the ISP in Sioux Falls would have to pay a remote or regional provider to carry (or "backhaul") its traffic to the nearest high-speed PoPs in Omaha, Nebraska (180 miles away) or Minneapolis (270 miles away). The only available and affordable link may be a DS-1 or fractional DS-1, and the ISP will likely find its traffic aggregated with other parties' traffic over these low-bandwidth links, a process over which it has no control.

Bell Atlantic has already demonstrated that there is significant congestion even at the highest levels (and fastest links) of the internet backbone, with the effect that the nationwide average speed for data transmission on the internet is only 40 kilobits per second.[8/] Rural subscribers and ISPs face additional chokepoints that slow this traffic even more. Their traffic is aggregated and routed to low-speed PoPs on the backbone. Whereas subscribers in large urban areas can connect to multiple and redundant PoPs, smaller communities are generally served by only a single PoP, and congestion or a technical failure at this PoP will effectively cut them off from the internet entirely. In addition, because rural subscribers and ISPs connect to the backbone lower in the hierarchy, their connections are of lower quality and more prone to congestion than similar connections in urban areas.

8/ See White Paper, attached to Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, at 21-27, CC No. 98-11 (filed Jan. 26, 1998)

Small-city and rural backbone connections are not only of poorer quality than their urban counterparts, but also far more expensive. On top of their normal monthly charges for access to the internet, ISPs must pay distance-sensitive charges ("backhauling charges") to transport their data to a backbone provider's PoP. If the ISP is located in a city with a PoP (as is the Denver ISP depicted in Illustration 10), these backhauling charges will be minimal. But the charges can be overwhelming for ISPs in smaller cities and rural areas. As noted above, an ISP in Sioux Falls, South Dakota (Illustration 11) must pay to haul its traffic either 180 miles to Digex's DS-3 PoP in Omaha or 270 miles to the UUNet or GTE PoPs in Minneapolis. A DS-1 link over the shorter route will cost the ISP more than $1,300 each month, and the cost will jump to over $22,000 per month for a DS-3 link.[2/] The expense of backhauling itself exacerbates network congestion problems: ISPs are driven to minimize backhauling costs by using the slowest links they can (DS-1s and fractional DS-1s) to connect to the backbone provider's PoP.

The lack of adequate backbone in smaller and rural communities stunts the deployment of advanced communications services and technologies to these areas. An ISP in a smaller market cannot offer its subscribers sophisticated information services if its only affordable connection to the internet is a fractional DS-1 that is continuously congested and becomes inoperable with every network failure at the sole PoP serving the market. Similarly, there is no point in rolling out high-bandwidth transmission technologies, such as digital subscriber lines, to local exchange customers in these smaller markets; chokepoints on the

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2/ As explained in greater detail below, allowing U S WEST to deploy a national internet backbone with a high-speed PoP in Sioux Falls would enable the ISP to avoid paying these backhauling charges.

backbone make it impossible for these customers to take advantage of the megabit speeds that the high-bandwidth technologies would offer. Indeed, deploying high-speed technologies at the local level in these markets would only make matters worse by funneling greater volumes of data traffic — from 256 kilobits per second to seven megabits per second for each digital-subscriber-line customer — to the already choked backbone.

Digital Subscriber Lines and Smaller Communities

Digital subscriber line technologies, known generically as "xDSL," use customers' existing copper loops to provide high-speed data transmission without interfering with the carriage of voice. U S WEST currently offers one form of this technology — rate-adaptive asymmetric digital subscriber lines, or "RADSL" — under the MegaBit Services brand name. A MegaBit customer uses a special modem that creates a data channel on the loop apart from the existing voice channel. The customer's loop is connected to a second modem in the central office. The second modem sits in a shelf called a digital subscriber line access multiplexer (or "DSLAM") that directs the voice traffic to the ordinary circuit-switched network and routes the data channel to a packet-switched network. In the packet-switched network, data is routed between ATM or frame relay switches connected to each other by private lines, and then to a business site or to an ISP for routing to the internet. With MegaBit Service, a customer's voice channel always remains operational even if the data channel is disrupted.

As noted above, U S WEST is currently engaged in the most aggressive deployment of digital subscriber line services in the country, having committed to providing its

MegaBit Service within the next few months in over forty cities in all fourteen of its states.[10/] U S WEST is committed to expanding this roll-out to smaller communities where it is economically feasible to do so. At the present time, roughly half of the customer loops in its service region are capable of being used for xDSL; the remainder are either served with multiplexing equipment that interferes with xDSL transmission (approximately 35%) or are too long to carry the partitioned signals without interference (approximately 15%). U S WEST's vendors are now developing xDSL equipment that is compatible with fiber-based loop multiplexing facilities and that can serve longer loop lengths; as a result, the portion of U S WEST's customers capable of being served with xDSL will increase over time.

Like many advanced communications and information services, xDSL is more difficult to deploy in less densely populated areas. A carrier recovers the costs of xDSL central-office facilities (such as DSLAMs, DS-3 links, and packet switches) from customers' use of those facilities, and central offices in less densely populated areas serve fewer customers. Rural areas also are more likely to have the longer loops and multiplexing equipment that make the deployment of xDSL services more expensive or perhaps prevent deployment altogether. Given the inherent difficulties of providing xDSL in these areas, introducing small efficiencies or inefficiencies into the deployment can make the difference between whether providing the service in a given market is economic or uneconomic.

U S WEST believes there is strong demand for MegaBit and other xDSL services in its region. These services can deliver enormous improvements in transmission speed at a price

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[10/] Only one other RBOC (Ameritech) has an xDSL tariff in place, and only in one state.

point that consumers can afford: $40 per month, with a nonrecurring charge of $145. U S WEST expects to have over 100,000 MegaBit Service subscribers in its region by the end of 1998. In addition to meeting pent-up customer demand for high-bandwidth services, U S WEST has strong network incentives to accelerate MegaBit Service deployment as much as feasible. As U S WEST has documented, and as the Commission recognizes, increases in data traffic are causing serious congestion on the circuit-switched voice network, since data calls typically have much greater holding times than the voice calls for which the network was designed.[11/] MegaBit Service alleviates this congestion by offloading data traffic to a separate packet-switched network before it encounters any circuit switch. Thus, in addition to providing customers with broadband services, U S WEST's MegaBit offerings contribute directly to the overall efficiency of the circuit-switched network.

Regulatory Barriers Preventing Deployment of these Services to Smaller Communities

As the previous sections demonstrate, low population densities make it more difficult for carriers to deploy internet backbone and xDSL technologies to residential and small-business customers in smaller and rural markets, and these areas accordingly fall well behind

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11/ See Comments of U S WEST, Inc. in Response to Notice of Inquiry Concerning Information Service Providers, CC Dkt. Nos. 96-262, 94-1, 91-213, and 96-263, filed on March 24, 1997. These comments contained a study demonstrating that the average length of a call to an ISP was 14 minutes, compared to four minutes for the average residential voice call and two minutes for the average business voice call. The study showed that over 40% of ISP calls were longer than five minutes, compared to 16% of residential voice calls and 8% of business calls. Moreover, because the study was completed before the proliferation of ISP service plans offering subscribers unlimited internet use for a flat monthly fee, it clearly underestimates the impact of ISP calls on the circuit-switched voice network; it is universally acknowledged that these unlimited-use, flat-rated plans have dramatically increased subscribers' use of the internet.

their larger counterparts. U S WEST is the best-positioned carrier in its region to correct these deficits. However, federal regulatory barriers either prevent U S WEST outright from stepping into the breach or force it to structure the needed services in a way that makes their deployment uneconomic.

1. High-speed data networks and the ban on interLATA data carriage. The ban on in-region, interLATA data transport makes it simply impossible for U S WEST to build an internet backbone (or any other kind of regional high-speed data network) in its fourteen states. There is no market for an "intraLATA internet backbone"; indeed, the term is an oxymoron. Illustration 12 shows how U S WEST currently configures its in- and out-of-region data networks, and the effect of the ban on in-region interLATA data carriage is obvious. U S WEST cannot connect the various PoPs in its region because they are in different LATAs. For the same reason, it cannot deploy the backbone necessary to provide adequate service to the smaller markets that are more distant from these PoPs. These limitations leave these communities dependent, for the most part, on single PoPs with no back-up; as a result, they can be cut off from the internet entirely by a single network failure. Adding insult to injury, ISPs in these communities must pay more than their urban counterparts for connections that are inferior, since they pay distance-sensitive charges for backhaul to the PoP.

Illustration 13 depicts the type of national network that U S WEST could and would build if InterACT were allowed to carry data across LATA boundaries and connect its various in-region and out-of-region networks. Building this backbone would increase the quality of internet services available to rural subscribers, and it would enable ISPs in these smaller

Current !NTERACT National Network Map

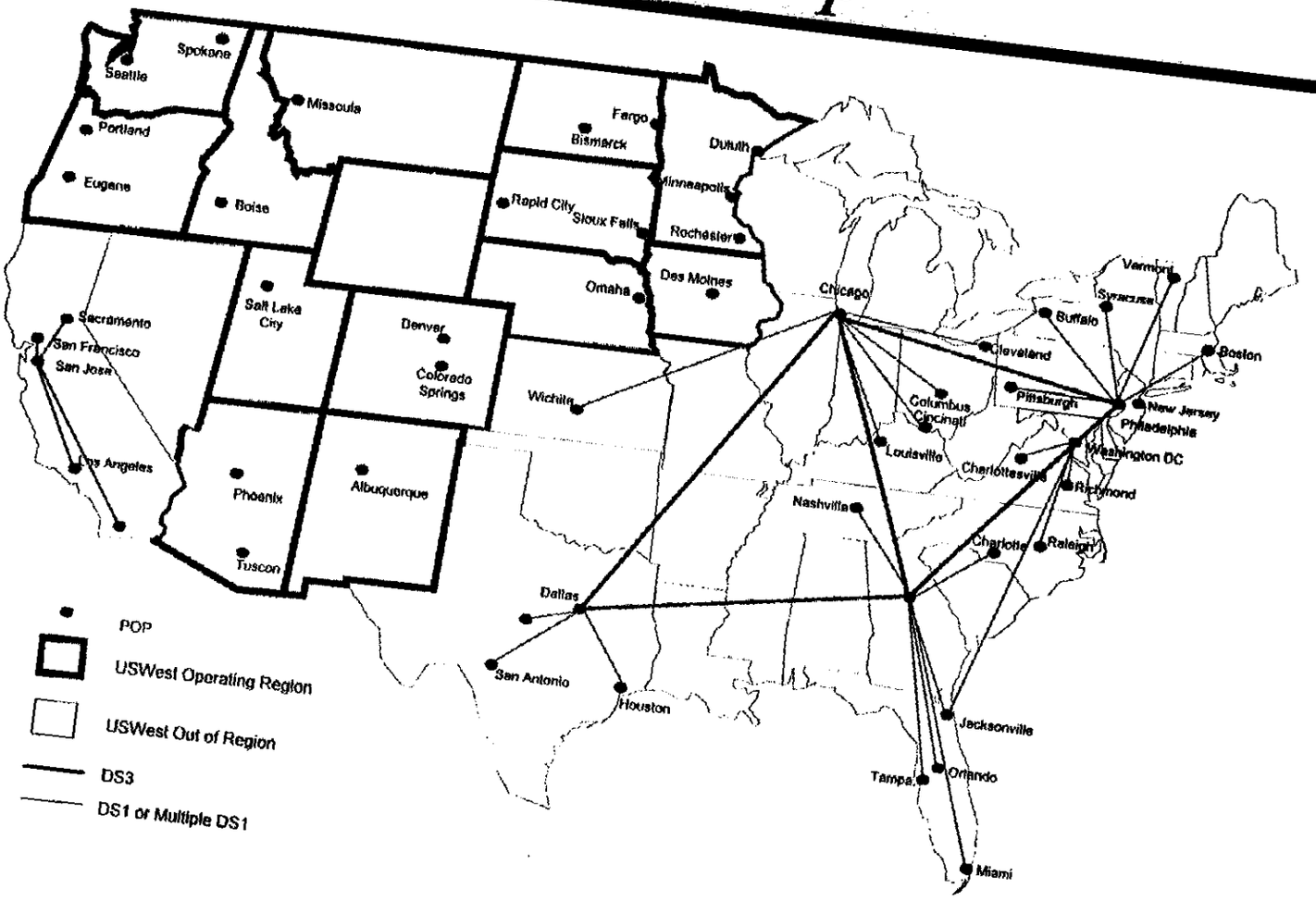

ILLUSTRATION 12

Proposed !NTERACT Infrastructure

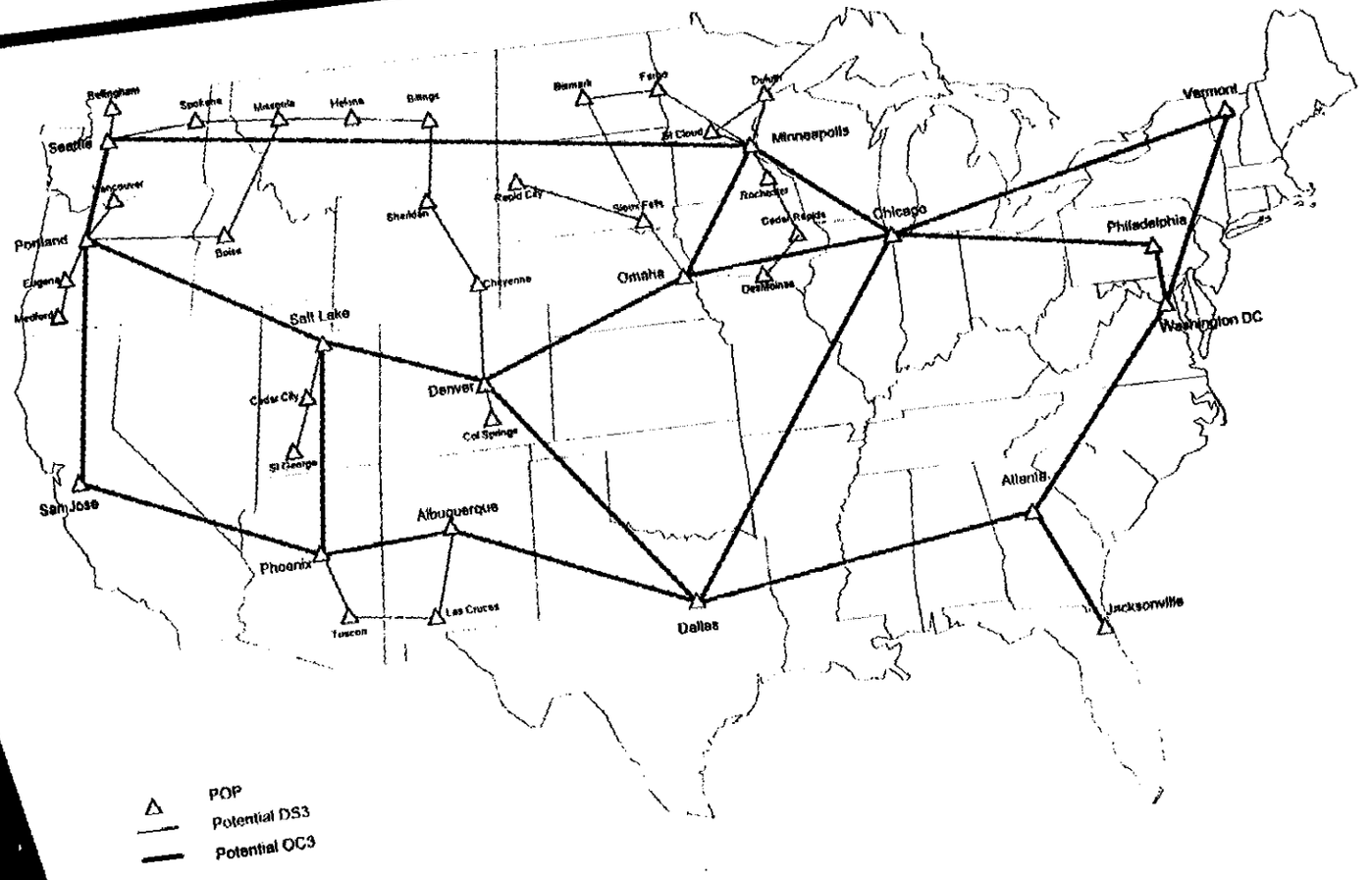

ILLUSTRATION 13

markets to expand dramatically the services they could offer. U S WEST could monitor the network from end to end, allowing for better management of traffic loads and more efficient network maintenance. U S WEST's entry into this market would increase redundancy in the backbone, preventing network failures from severing communities' connections to the information superhighway. Most importantly, as this diagram illustrates, U S WEST would be able to deploy greater bandwidth to many additional smaller markets, alleviating the network congestion rural ISPs and subscribers face, decreasing the costs of their connections to the internet by reducing the need for backhauling, and improving the quality of their connections by allowing them to reach the upper levels of the internet hierarchy in fewer hops. Put very simply, regulatory relief would enable the Sioux Falls ISP in Illustration 11 to operate like the ISP in Denver in Illustration 10.[12/]

But U S WEST can build this national backbone only if it is permitted to transport data across LATA boundaries; otherwise, despite the great pent-up demand for this and other data networking services, U S WEST is limited to an in-region, non-interconnected network and the wholly separate out-of-region networks depicted in Illustration 12. The ban on interLATA data carriage has forced U S WEST to turn down many requests for assistance from educational institutions, independent ISPs, and other potential clients. In March 1997, for example, a coalition of universities and government institutions — including Arizona State University, the Colorado School of Mines, Colorado State University, the Universities of Colorado at Boulder

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12/ In addition, allowing U S WEST to provide cell-switched and frame relay services across LATA boundaries would sharpen U S WEST's incentives to deploy bandwidth even further by making it easier to aggregate the critical masses of data traffic that make deployment in smaller markets economic.

and Denver, the National Center for Atmospheric Research, the University of New Mexico, the University of Utah, and Utah State University — asked U S WEST to submit a proposal to build a high-speed cell-relay network connecting these institutions, to be known as "Westnet2." Because of the interLATA restriction, U S WEST could not offer to build an integrated wide-area network as the Westnet2 members had hoped; instead, it could offer only a series of smaller ATM networks connected by cell-relay links purchased from an interexchange carrier.[13/] While the coalition members were extremely interested in having U S WEST build Westnet2, given that the company had already built many of the intraLATA ATM networks these institutions were currently using, they were reluctant to proceed and ultimately put the project on hold; U S WEST's having to rely on a second carrier to provide the interLATA links of the network meant that it could not guarantee the reliability of those links and introduced too many contingencies into the project. U S WEST will never be able to build the type of networks that these institutions need so long as the ban on interLATA service applies to data networking services.

2. MegaBit Service and the ban on interLATA data carriage. The ban on in-region, interLATA data carriage similarly hampers the efficient provision of xDSL services such as MegaBit, making it prohibitively expensive for U S WEST to deploy these technologies in rural areas. The central office equipment used to provide MegaBit Service is expensive: a basic, 128-user DSLAM costs approximately $73,000 installed (and several might be necessary), an installed ATM switching system costs approximately $350,000, and the DS-3 networking needed

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13/ Ironically, U S WEST would have been allowed to build a region-wide network for the coalition (albeit only an internet backbone network) had its members been elementary or secondary schools instead of universities. See 47 U.S.C. § 271(g)(2).

to connect the central office with other central offices can cost several hundred thousand dollars, depending on how remote the office is and what facilities have already been deployed. The costs of deploying xDSL services decrease significantly (and the number of central offices in which customer demand reaches the break-even point accordingly increases) to the extent that central offices can share equipment. In particular, if U S WEST could aggregate traffic from multiple central offices in different LATAs to centralized high-capacity ATM switches, it could reduce the number of switches it would have to deploy and decrease the costs of rolling out MegaBit Services to these central offices.[14/]

Illustration 14 demonstrates how this might be done. The DSLAMs in each central office supporting MegaBit Services would be connected with a DS-3 to the nearest regional ATM switch, which might be in a different LATA. (For clarity, the central-office connections are not shown in the illustrations.) The ATM switches would be connected to one another with DS-3, OC-3, or other high-capacity links. Data traffic could be aggregated and handed off to ISPs or corporate intranets at single, efficient host connections.

But because U S WEST is not allowed to aggregate data traffic from central offices in different LATAs, it must build a redundant set of facilities in each one, as shown in Illustration 15. In this configuration, each central office must connect to an ATM switch located in the same LATA. Each redundant ATM switching system that U S WEST must install adds $350,000 to the costs that must be recovered from small- and rural-market customers before

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14/ The availability of high-capacity ATM switches allows for significant economies of scale in cell-switched networks. For example, U S WEST's out-of-region ATM network, when complete, will need only eight to ten switches to serve the top eighty out-of-region markets.

HYPOTHETICAL ATM SWITCH DEPLOYMENT FOR DSL WITH INTERLATA RELIEF

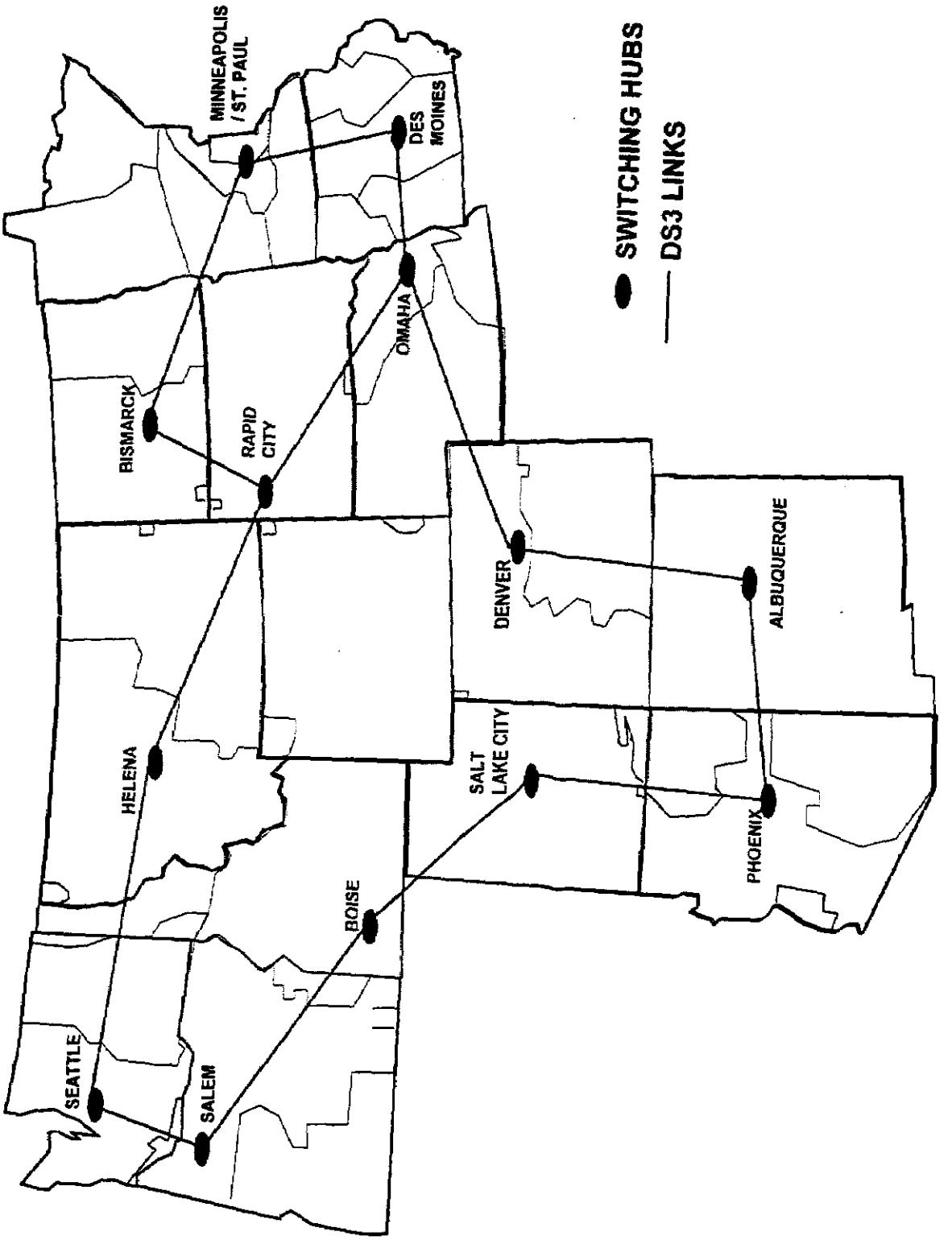
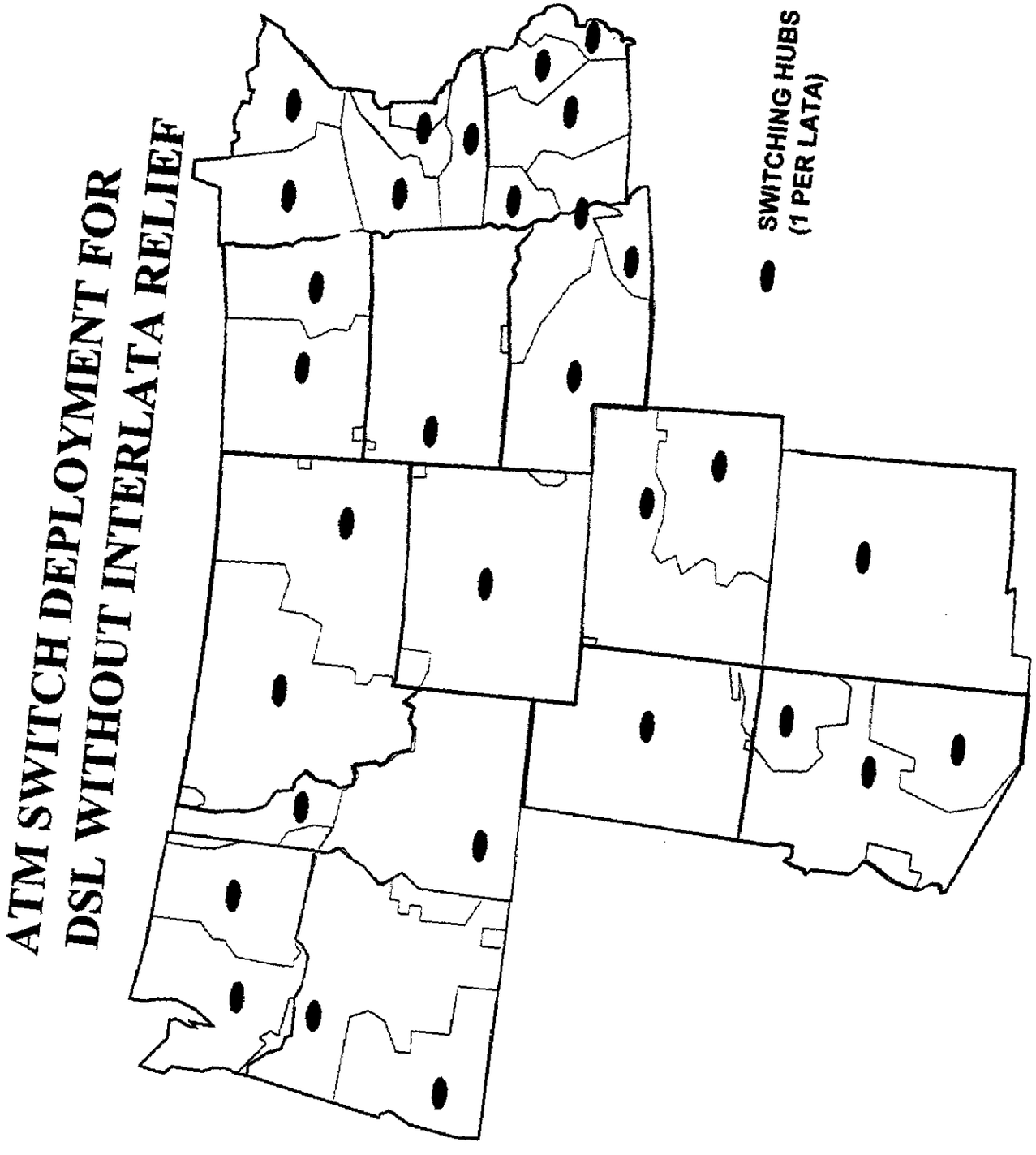


ILLUSTRATION 15



deployment of MegaBit Services would break even, and the added cost can tip the balance against ever deploying xDSL in that LATA. Just as importantly, this forced, inefficient configuration adds to the costs faced by independent ISPs. Because U S WEST may not aggregate data traffic across LATA lines and route it to a single ISP host connection, a regional ISP that wants to receive MegaBit traffic from subscribers in several different LATAs must establish redundant (and less efficient) MegaCentral host connections in each one and aggregate the traffic itself.

3. Unbundling and resale requirements. Finally, both the deployment of data bandwidth and the roll-out of xDSL require massive investments by U S WEST. U S WEST will invest approximately $96 million in its in-region and out-of-region data networks this year, and will likely invest another $350 million over the next five years, depending on whether it is allowed to build a nationwide network. Likewise, as the previous section established, deploying xDSL to a central office requires enormous capital investments: U S WEST must install one or more DSLAMs in each central office, prepare the loops of each MegaBit Service subscriber, and cable the office to a network of ATM switching systems. U S WEST is already investing $116 million to meet its announced forty-city roll-out of MegaBit Services, and deploying the service beyond those forty cities would require the company to invest hundreds of millions more, depending on the scope of the deployment. U S WEST can rationally make these investments only if it is able to achieve an economic return on them. As described in greater detail below, application of the Commission's unbundling and resale rules to these services discourages U S WEST from making these investments, because the company must turn its innovative new

services over to its competitors at significant discounts. And, in turn, by allowing the competitors to free ride on U S WEST's investments and innovations without risk, the rules discourage those companies from investing in competing offerings of advanced services, which further slows Congress's hoped-for deployment of data services to rural communities.

ARGUMENT

THE COMMISSION CAN AND SHOULD GRANT THE RELIEF REQUESTED IN THIS PETITION.

Under the Commission's rules, any person may petition the Commission to take formal action, to refrain from acting, or to amend, appeal, or waive its rules. See, e.g., 47 C.F.R. §§ 1.3, 1.401. Parties may also petition the Commission to investigate any matter relevant to the "carrying out of its duties or the formulation or amendment of its rules and regulations." 47 C.F.R. § 1.1. Section 706 of the Telecommunications Act gives the Commission the power to grant the relief U S WEST requests, by authorizing the agency to forbear from applying rules that hinder the deployment of advanced telecommunications capacity to all Americans.[15/] The Commission should exercise that power to forbear from imposing the regulatory burdens described above because those burdens frustrate the nationwide deployment of advanced services and technologies, especially to rural areas.

15/ U S WEST is not asking the Commission to rely on its generic forbearance authority in Section 10 of the Telecommunications Act, codified at 47 U.S.C. § 160(a). By express limitation, that power cannot be used to forbear from the application of rules implementing Sections 251 and 271 of the Act until the Commission finds that those sections have been fully implemented. See 47 U.S.C. § 160(d). While U S WEST has fully implemented Section 251, it has not yet obtained Commission approval under Section 271 to provide interLATA services. By contrast, the more targeted grant of forbearance authority in Section 706 contains no such limitation.

I. SECTION 706 GIVES THE COMMISSION POWER TO FORBEAR FROM APPLYING REGULATORY REQUIREMENTS THAT ARE HINDERING THE RAPID DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY AND DIRECTS THE COMMISSION TO USE THAT POWER.

In the Telecommunications Act, Congress specifically acknowledged that carriers' regulatory burdens often discourage them from developing and deploying advanced services and technologies. It therefore directed the Commission to identify such barriers and take affirmative steps to lift them. As noted above, Section 706 of the Act places a duty on the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Act § 706(a), codified at 47 U.S.C. 157 note (emphasis added).[16/] By "advanced telecommunications capability," Congress meant exactly the broadband data services and facilities that U S WEST is seeking here to provide: "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." Id. § 706(c).

In addition, Section 706 directs the Commission to ensure that these services are deployed to "all Americans." As noted above, Congress was especially concerned that rural

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16/ In turn, 47 U.S.C. § 157 declares it "the policy of the United States to encourage the provision of new technologies and services to the public," and puts the burden of persuasion on parties seeking to oppose the authorization and deployment of new technologies. U S WEST submits that parties opposing this petition should bear that burden.

consumers have access to the same advanced services as urban ones, and it wrote that concern into the Act, both here and in the universal service provisions. See, e.g., 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including . . . those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas."). Recent remarks by Chairman Kennard demonstrate that the Commission is well aware of its statutory obligations "to ensure . . . that telecommunications services remain comparable in all areas of the country" and to prevent rural America from becoming "a 'have not' zone in the telecommunications age."[17] The Commission has properly recognized that it was given its power under Section 706 as a tool for achieving these goals.[18]

Congress intended that the Commission use this power to provide relief wherever it has evidence that regulatory burdens hinder the deployment of advanced services and technologies. It directed the Commission to inquire periodically "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely

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[17] Press Statement of Chairman William E. Kennard on the Second Anniversary of the Telecom Act of 1996 at 3 (Jan. 30, 1998); see also Remarks by William E. Kennard, Chairman, Federal Communications Commission, to the National Association of State Utility Consumer Advocates at 5 (Feb. 9, 1998) ("We cannot allow rural America to become a 'have not' zone in the telecommunications age. . . . Today it is the Information Superhighway that can bring us together as a nation. Or it can divide us. It can connect small and rural communities to the world of commerce and culture. Or it can leave them behind."); Remarks by William E. Kennard, Chairman, Federal Communications Commission, to the Organization for the Promotion and Advancement of Small Telephone Companies at 2 (Jan. 12, 1998).

[18] The Commission has noted that "section 706 reinforces the goals of section 254," the universal service provisions of the Act. Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9091 at ¶ 605 (1997).

fashion," and, if not, provided in mandatory terms that the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Id. § 706(b) (emphasis added).[12/] The legislative history of Section 706 confirms that, if the Commission finds that regulatory barriers are preventing carriers from deploying advanced services and technologies to all Americans, the Commission "is required to take immediate action to accelerate deployment," including "regulatory forbearance, and other methods that remove barriers and provide the proper incentives for infrastructure investment." H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. 210 (1996) (emphasis added); see also S. Rep. 104-23, 104th Cong., 1st Sess. 50 (1995) (same). Moreover, while Section 10 of the Act withholds its forbearance authority from the Commission until 47 U.S.C. §§ 251 and 271 have been "fully implemented," Section 706 contains no such limitation, highlighting the critical importance Congress placed on the task of ensuring that all Americans, not just a privileged few, have timely access to the new information age.

12/ While Congress directed the Commission to undertake a formal inquiry on this subject and act on its findings, that does not mean that the Commission may act or find facts only in the context of such an inquiry; otherwise, Section 706(a)'s instructions to the Commission would be surplusage. The Communications Act gives the Commission a general power to find facts and take action to enforce the statute, whether on petition from an interested party or on the Commission's own motion. See 47 U.S.C. § 403. As ex-Chairman Hundt testified to Congress, "Section 706 does not require that the FCC wait two and a half years [the deadline for the formal notice of inquiry] before trying to explore ways to deliver advanced telecommunications services to all America, especially including rural America." Testimony of Reed E. Hundt before the Senate Commerce, Science and Transportation Committee, S. Hrg. 104-623, FCC Oversight and Implementation of the Telecommunications Act of 1996 (June 18, 1996).

The Commission should now find that the regulatory burdens that U S WEST has identified are preventing "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," especially those who live in rural areas, and take immediate action to remove those barriers.

II. THE COMMISSION SHOULD ENCOURAGE THE DEPLOYMENT OF DATA AND INTERNET BANDWIDTH TO SMALLER COMMUNITIES BY AUTHORIZING U S WEST TO BUILD HIGH-SPEED NETWORKS ACROSS LATA BOUNDARIES.

As explained in detail above, internet backbone capacity is in short supply nationwide, and the shortage in the smaller and rural markets served by U S WEST is even more severe. The high-speed links on the backbone connect only the principal nodes of the national network, which are located almost exclusively in major metropolitan areas. By contrast, rural ISPs are connected to the national backbone by much slower links — typically T-1 lines, or even 56 kilobit lines — and are generally served only by a single PoP. These extra chokepoints slow rural users' maximum internet speeds below the already low national averages. For these users, the internet is hardly the "advanced telecommunications capability" that Section 706 seeks to promote, as it falls far short of a "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." Act § 706(c)(1).

In addition, as noted above, ISPs and subscribers in these smaller markets must pay more than their urban counterparts for their slower and technically inferior links to the internet. Prohibitive distance-sensitive charges for backhauling traffic to the backbone providers' PoPs force ISPs in smaller markets to use the lowest-capacity transport links they can,

even if those slow links make it impossible to offer their subscribers advanced information services. Finally, the lack of bandwidth to and on the backbone in rural areas discourages carriers from deploying advanced telecommunications technologies such as digital subscriber lines in these communities; for customers in these markets, a megabit-speed connection to a choked backbone would be as much of a waste as buying a Lamborghini to travel on a 25 mile-per-hour residential street.

As the carrier with the greatest infrastructure investment in the rural communities of its service region, U S WEST is the logical party to deploy the critically needed new transmission capacity to and on the internet backbone in these areas. As Illustration 13 demonstrates, U S WEST would like to build a national data network that would increase high-speed connectivity to the rural portions of its region and alleviate congestion nationwide. U S WEST has strong incentives to make the necessary investments. A faster internet would, in the short term, increase the demand for second and third telephone lines; over the longer term, it would fuel the company's sales of advanced communications technologies such as xDSL and its data networking services. In turn, U S WEST's deployment of a backbone network with more PoPs in smaller communities would enable independent ISPs to expand the information services they make available to customers in those markets. ISPs would not have to pay the prohibitive backhauling charges that discourage them from connecting to the internet with high-capacity links, and the links they have would be more reliable.

Although U S WEST is capable of doing more than any other carrier in its region to alleviate internet congestion and bring advanced services to rural America, regulatory barriers prevent it from entering the market and from making the investments in the infrastructure

necessary to deploy advanced telecommunications capacity. Preventing U S WEST from carrying data across LATA boundaries is equivalent to banning U S WEST outright from the business of providing regional internet backbone services. Section 706 directs the Commission to undertake "regulatory forbearance" and "measures that promote competition" to remove these barriers, and the Commission should carry out its mandate by allowing U S WEST to enter and compete in this market for internet backbone services.[20/]

III. THE COMMISSION SHOULD ALLOW U S WEST TO CARRY DATA ACROSS LATA BOUNDARIES INCIDENT TO ITS PROVISION OF MEGABIT (xDSL) SERVICES.

As noted above, the ban on interLATA data carriage indirectly depresses demand for advanced communications services such as U S WEST's MegaBit Service by thwarting the investments in internet infrastructure that would alleviate internet congestion and make these advanced services useful. The ban also frustrates the deployment of xDSL technologies more directly. By denying carriers such as U S WEST the ability to aggregate data traffic across LATA boundaries, it prevents them from taking advantage of economies of scale without which the deployment of xDSL services in thinly populated areas is infeasible. As described above,

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20/ Under the prior regime of the MFJ, similar accommodations were made to encourage the development of new services or increase competition. See, e.g., United States v. Western Elec. Co., 890 F. Supp. 1, 6 (D.D.C. 1995) (allowing BOCs to provide cellular interexchange service where competitive access providers operate), vacated as moot, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished disposition); Memorandum Opinion and Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Feb. 16, 1989) (blanket waiver of LATA boundaries for wide-area paging services); Memorandum, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Sept. 11, 1989) (allowing BOCs to use centralized computers to provide telecommunications relay services for the deaf across multiple LATAs); Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Feb. 2, 1989) (same for E-911 services).

rolling out MegaBit Service requires U S WEST to make substantial investments in its central offices and interoffice facilities. In particular, it must build a separate, high-capacity data network to transport callers' data traffic to corporate intranets, ISPs, or directly to the internet backbone, and there are significant economies of scale to building this data network. To the extent that U S WEST can use centralized facilities and hand off larger volumes of traffic to ISPs at larger, centralized nodes, the network becomes far less costly to build. Each redundant ATM switching system that U S WEST can avoid constructing reduces its deployment costs by $350,000.

But the bar on interLATA data carriage prevents U S WEST from building a data network that crosses LATA boundaries. As a result, U S WEST must build a redundant and fully self-contained set of data facilities in each LATA in which it wants to provide MegaBit Service. Notwithstanding these forced inefficiencies, it may still be economic (although more expensive to the consumer than necessary) to deploy xDSL in urban areas, where loop lengths are short, potential traffic volumes are high, and there are many adequate ISPs and handoff points within the LATA. As noted above, however, the interLATA restrictions make it uneconomic to deploy the service in smaller communities.

Even without the interLATA restrictions, xDSL technologies are more expensive to deploy in thinly populated areas than densely populated ones. Longer loop lengths present problems of signal attenuation that require extra hardware, and lighter traffic volumes mean that construction costs must be recovered from fewer subscribers. Many of these costs could be borne if allocated across a broader customer base, but this can be done only if U S WEST serves larger groups of customers with the same common facilities. Requiring U S WEST to build

duplicative network facilities in each LATA and denying it the ability to use efficient out-of-LATA handoff points make the rollout of xDSL to rural America infeasible. To meet its mandate under Section 706, the Commission should grant U S WEST limited interLATA relief, either by lifting the ban on interLATA data carriage or by redefining LATA boundaries, allowing it to aggregate data traffic from multiple thinly populated areas and use centralized, high-volume network facilities and handoff points to ISPs.

IV. THE COMMISSION SHOULD FORBEAR FROM REQUIRING U S WEST TO UNBUNDLE ITS NON-BOTTLENECK DATA AND xDSL FACILITIES FOR ITS COMPETITORS, AND FROM REQUIRING IT TO PROVIDE ITS DATA SERVICES TO RESELLERS AT A WHOLESALE DISCOUNT.

The Commission should also forbear from applying the unbundling and resale discount requirements of 47 U.S.C. §§ 251(c)(3) and (4) to non-circuit-switched data services and facilities.[21/] Although, as we explain below, the language of these statutory provisions suggests that these requirements do not apply to the advanced data facilities and services described in this petition, the scope of the Commission's current rules implementing the provisions is ambiguous. These requirements, if imposed on the facilities and services described here, would severely and inefficiently distort carriers' incentives to invest in and deploy the advanced telecommunications capabilities that Section 706 directs the Commission to encourage. The Commission would only make matters worse if, as it recently proposed, it were to extend to

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21/ U S WEST emphasizes that its request for forbearance is limited to the unbundling and resale discount rules derived from the Telecommunications Act, 47 U.S.C. §§ 251(c)(3) and (4). It does not request relief at this time from the obligations imposed under the Commission's Open Network Architecture rules, nor does it seek exemption from the Commission's generally applicable total-service resale requirements.

"pure" information service providers (that is, those that are not also telecommunications carriers) the right to obtain unbundled network elements.[22] Accordingly, the Commission should use its power under Section 706 to limit application of the Telecommunications Act's unbundling and resale discount requirements to traditional local-exchange, circuit-switched voice services and facilities.

The unbundling provisions of the Act require incumbent local exchange carriers to provide the elements of their telephone exchange networks to competitors on an unbundled basis and at rates based on cost plus a reasonable profit. 47 U.S.C. §§ 251(c)(3), 252(d)(1). The Act gives the Commission authority, subject to some constraints, to define which elements of carriers' networks must be unbundled in this fashion. Id. § 251(d)(2).[23] The text of the Act suggests that Congress intended that carriers would unbundle only the elements of their networks used to provide traditional circuit-switched telephone exchange services.[24] However, the

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22/ See *Computer III* Further Remand Proceedings, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 95-20, 98-10 at ¶¶ 94-96 (released Jan. 30, 1998).

23/ The Supreme Court has granted U S WEST's cross-petition for certiorari challenging the standards the Commission has used to identify the network elements to be unbundled. U S WEST v. FCC, No. 97-1099, cert. granted Jan. 26, 1998.

24/ Both the unbundling and resale discount provisions of the Act apply only to "incumbent local exchange carriers." 47 U.S.C. § 251(c). A "local exchange carrier" is defined as a person providing "telephone exchange service or exchange access." Id. § 153(26). "Telephone exchange service," in turn, is "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange . . . , or (B) comparable service provided through a series of switches, transmission equipment, or other facilities . . . by which a subscriber can originate and terminate a telecommunications service."

A procompetitive reading of these provisions would be that a carrier providing the (continued...)

Commission's unbundling and resale rules have so far not drawn any distinction between incumbent LECs' voice networks and service offerings on the one hand, and their packet-switched networks and data services on the other.

Requiring incumbent LECs to provide their advanced-service facilities to competitors on an unbundled basis at cost-based rates would reduce their incentives to innovate and invest in infrastructure. In a competitive marketplace, competitors invest in new facilities (and in research to develop such new facilities) in order to differentiate themselves from each other. Government rules that impair the ability of a competitor to achieve the normal economic results of prudent investment destroy this process. An incumbent LEC contemplating an

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24/ (...continued)
advanced data services described in this petition is not providing "telephone exchange service," and therefore is not an "incumbent local exchange carrier" subject to the obligations of 47 U.S.C. § 251(c). An internet backbone does not begin and end "within a telephone exchange, or within a connected system of telephone exchanges," nor do the data portions of calls made over xDSL connections. (Indeed, the very point of deploying xDSL is to remove data communications from the voice network.) Moreover, whether a service is "comparable" to traditional telephone exchange service depends on whether it is primarily a substitute for two-way, switched, wireline voice services. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15999 at ¶ 1013 ("*Interconnection First Report and Order*") (holding cellular, broadband PCS, and SMR services to be "comparable" because "these CMRS providers provide local, two-way switched voice service as a principal part of their business"). As the Commission has recognized, distributed packet-switched services are fundamentally unlike traditional two-way circuit-switched voice services, and regulations governing the latter cannot be extended uncritically to the former. See, e.g., Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, 11 FCC Rcd 21354, 21391 at ¶ 311 (1996). The idea that a company might be an incumbent LEC with respect to some of its services but not others is unremarkable; for example, the Commission has held that incumbent LECs' CMRS affiliates are not themselves LECs subject to the duties imposed by 47 U.S.C. §§ 251(b) and (c). See *Interconnection First Report and Order*, 11 FCC Rcd at 15995, ¶ 1004. And nobody suggests that GTE and Sprint must make their competitive long distance offerings available to resellers at an avoided-cost discount simply because the carriers are also incumbent LECs.

investment in an innovation that it knows cannot be used to differentiate its services will not make the investment. Similarly, an incumbent LEC that knows that it alone must bear the costs of any unsuccessful innovations, while being forced to share any resulting benefits, will not risk experimenting with innovations that might not prove successful. Conversely, permitting CLECs or other competitors to obtain an incumbent LEC's advanced-service facilities at cost on an unbundled basis inefficiently discourages them from investing in their own facilities. If a CLEC can avoid all research and development risks by waiting to exploit the incumbent LEC's innovative services and technologies, and if it can abandon those innovations at any time without cost or risk should they turn out to be less successful in the marketplace than anticipated, the CLEC itself is discouraged from experimenting, investing, and innovating.

Likewise, the Commission has interpreted the resale discount requirement in 47 U.S.C. § 251(c)(4) in a way that, if applied to the data services that are the subject of this petition, would discourage incumbent LECs and CLECs from competing to deploy advanced telecommunications and information services to all Americans. While the text of the provision suggests that Congress intended to limit the resale obligation to traditional circuit-switched "telephone exchange services,"[25] the Commission has suggested that incumbent carriers may have to make all of their tariffed retail services available to their competitors at a sharp discount for resale.[26] If that suggestion were implemented, the result would be predictable. As under the unbundling rules, incumbents would be inefficiently discouraged from developing and deploying

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25/ See supra note 24.

26/ See *Interconnection First Report and Order*, 11 FCC Rcd at 15934, ¶ 872.

innovative advanced services, because they would know that their competitors could immediately offer the same services without bearing any of the innovation risks; and competitors would be discouraged from undertaking their own innovations and investing in the infrastructure needed to deploy competing service offerings.

In sum, the Commission's unbundling and resale discount rules, if applied broadly and beyond the reasonable confines of the circuit-switched local exchange network, would lead both incumbent LECs and CLECs to underinvest in innovative services and technologies, thereby frustrating the deployment of advanced telecommunications capabilities for all Americans. Carriers such as U S WEST must take these rules into account in deciding whether it makes economic sense to invest in or deploy advanced information and communications services. To comply with Congress's mandate in Section 706, therefore, the Commission should amend its unbundling and resale discount rules to specify that they apply exclusively to traditional circuit-switched voice services and the facilities used to provide them. Exempting data transport services and broadband packet-switched facilities from the unbundling and resale discount requirements will encourage incumbent LECs and CLECs to invest in the infrastructure necessary to deploy advanced telecommunications capacity to all communities.

U S WEST is not asking the Commission to remove the unbundling and resale discount requirements from the underlying "bottleneck" facilities that may be used in voice and data services alike. For example, U S WEST is not suggesting that the Commission should refrain from requiring unbundling of the copper loop simply because it can be used to provide advanced services such as xDSL as well as traditional voice local exchange services. Rather, U S WEST urges the Commission to limit the scope of the unbundling and resale discount rules to

those facilities and services that are truly bottlenecks. That category does not include competitive data networking services or the advanced data facilities that are used only to provide advanced telecommunications capabilities.

The specialized equipment used to provide xDSL, such as DSLAMs and ATM switches, are facilities that any competitor can supply, and many do. As Commission staff have recognized, competitors such as WorldCom and Covad now purchase unbundled loops from incumbent LECs and combine them with their own DSLAMs and packet-switched networks to offer ISDN and xDSL to business customers.[27] Because any competitor may purchase DSLAMs from a third-party vendor and collocate them in U S WEST's central offices, 47 U.S.C. § 251(c)(6), DSLAMs cannot be a "bottleneck" facility.[28] This is equally true for the routers and transport facilities that make up U S WEST's cell- and packet-switched data networks (including the packet-switched network that carries xDSL data traffic beyond the central office); the market for this equipment is fiercely competitive, and none of it needs to be located on incumbent LEC property. These are not essential facilities that competitors must go without if U S WEST did not unbundle them at cost.

27/ See Kevin Werbach, A Digital Tornado: The Internet and Telecommunications Policy, Office of Plans and Policy Working Paper at 34 (Mar. 1997). For a description of how Covad uses collocated DSLAMs and unbundled loops to provide competitive xDSL, see Bob Metcalfe, "Covad Offers Competitive, High-Speed Connections Right Under SBC's Nose," Infoworld at 87 (Dec. 22, 1997).

28/ U S WEST does not seek relief from its obligation to provide conditioned loops as unbundled network elements and collocation space to competitive carriers. With these two elements, plus appropriate transport from U S WEST where necessary, a competitive CLEC can construct its own xDSL service.

Similarly, the Commission should not require U S WEST to make its finished MegaBit and data networking services available at wholesale discounts for resale because there are no obstacles to their competitive provision. The markets to provide these services (or their close substitutes) are vigorously competitive. Set forth above are some of the many firms, including non-telephone companies, that currently provide national and regional internet backbone services. The markets for other cell- and packet-switched networking services are even more open and competitive.[29/] Similarly, the market for xDSL and its competitive substitutes is wide open. Not only are there multiple competitive providers of digital subscriber line services, as noted in the previous paragraph; but xDSL is just one of many high-bandwidth technologies — including cable modems, unlicensed-spectrum wireless modems, fixed wireless loop technologies, LMDS, and satellites — competing to bring customers high-speed network access.[30/] In the Phoenix area, for example, U S WEST's MegaBit Service offerings compete

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29/ Independent consulting firm International Data Corporation reported that the total U.S. market for cell- and packet-switched networking services would grow from $2.0 billion in 1996 to almost $3.3 billion by year-end 1997, a 64% growth rate. IDC forecasted that this market would grow to more than $10.5 billion by 2001. See IDC Corporation, U.S. Packet/Cell-Based Services Market Share and Forecast 2 (Oct. 1997). The report noted that the many competitors in this market come from a variety of different industry sectors, and include incumbent LECs (such as U S WEST and GTE), interexchange carriers (such as AT&T and MCI), competitive LECs (such as MFS), and non-carrier value-added network providers (such as IBM, CompuServe, and Infonet). Id. at 5-6.

30/ In a recent speech, Commissioner Ness catalogued many of the different companies competing to offer broadband services and the different technologies that they are using or developing. See Remarks of Commissioner Susan Ness before the WashingtonWeb Internet Policy Forum at 3-4 (Feb. 9, 1998) (discussing, among other technologies, xDSL, cable modems, unlicensed wireless internet access, LMDS, and satellite data services). Commissioner Ness properly recognized that these technologies are substitutes that compete with one another for the same customers. Id. at 6.

directly with the @Home services Cox Communications offers over its hybrid fiber-coaxial networks.[31/] Because U S WEST is starting in these markets with virtually zero market share, there is little risk that U S WEST would be able to restrict competition in them.[32/]

U S WEST emphasizes that it is also committed to making these services broadly available to independent ISPs on the same basis that it makes them available to itself. Basic xDSL service will be available to all ISPs, including U S WEST's internet access service, on equal terms, subject to Open Network Architecture principles. As explained above, the advanced services U S WEST will be able to deploy if it is given regulatory relief greatly benefit the ISPs in its region and not only U S WEST. If U S WEST can deploy greater bandwidth to smaller markets, ISPs in these markets will be able to obtain the higher-quality backbone connections now available only to ISPs in larger metropolitan areas, and without having to pay prohibitive

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31/ See Sandra Guy, "DSL Headway," Telephony at 30-32 (Feb. 9, 1998).

32/ That these services would be U S WEST's initial offerings in their respective markets means that there is no need to make them available for resale to competitors at discounted prices, according to the standards laid out in the Commission's order denying BellSouth permission to enter the interLATA market in Louisiana. First, given that U S WEST has zero current market share in these services, there can be no concern that the asked-for forbearance "may reflect an attempt by [an] incumbent LEC to preserve [its] market position." Application by BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, As Amended, To Provide In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order, CC Dkt. No. 97-231, ¶ 68 (Feb. 4, 1998). Second, it strains credulity to suggest that U S WEST is asking for forbearance in its data businesses because it plans to "convert" its existing basic voice customers en masse to deregulated service offerings, and thereby "evade" regulatory scrutiny of its core business. Id. ¶ 69. As explained above, a primary reason to deploy xDSL and similar data technologies is to enhance the reliability of the existing circuit-switched voice network, not obviate it; by removing data communications from the voice network, these technologies strengthen incumbent LECs' core voice service offerings. More fundamentally, whatever the future potential for voice over the internet, a widescale conversion of existing circuit-switched voice traffic into packet-switched data communications is clearly some time away.

distance-sensitive backhaul charges. The more broadly U S WEST is able to deploy its MegaBit services giving customers fast internet access, the greater will be the demand for ISP services. For this reason, independent ISPs have actually been the most enthusiastic customers of U S WEST's MegaBit offerings. In the four months that these services have been available in Phoenix, the first city in which they were deployed, twelve independent ISPs have subscribed to MegaCentral connections that allow their subscribers to connect to their services at higher speeds. Moreover, as the Commission has recently noted, competition in internet transmission and hosting markets is becoming sufficiently robust, and competitors sufficiently powerful, that it is increasingly impossible for an incumbent such as U S WEST to discriminate in favor of its own advanced-service operations.[33/] Both the marketplace and the Open Network Architecture rules ensure that U S WESTs data services will serve the entire community of ISPs.

In sum, U S WEST has specifically tailored its service offerings and its request for relief to be pro-competitive. Granting this petition will benefit CLECs and unaffiliated ISPs, as well as the people who live in U S WEST's region.

CONCLUSION

For these reasons, U S WEST asks the Commission to issue an order:

1. Finding that the Commission's ban on interLATA data carriage and its rules implementing 47 U.S.C. §§ 251(c)(3) and (4) hinder "the deployment on a reasonable and timely

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33/ See *Computer III* Further Remand Proceedings, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 95-20, 98-10 at ¶ 36 (released Jan. 30, 1998).

basis of advanced telecommunications capability to all Americans" within the meaning of Section 706(a) of the Telecommunications Act of 1996.

2. Permitting U S WEST to build and operate internet backbone networks and other packet- and cell-switched networks across LATA boundaries within its region.

3. Allowing U S WEST to transport data across LATA boundaries incident to its provision of MegaBit Services or other digital subscriber line services.

4. Forbearing from applying the requirements of 47 U.S.C. § 251(c)(3) and the Commission rules implementing those requirements to the nonbottleneck facilities used to provide U S WEST's packet- and cell-switched network services and its MegaBit and other digital subscriber line services.

5. Forbearing from applying the requirements of 47 U.S.C. § 251(c)(4) and the Commission rules implementing those requirements to U S WEST's data networking, MegaBit, or other digital subscriber line service offerings.

Respectfully submitted,

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February 25, 1998

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)))))	CC Dkt. No. 98-146

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits these comments in response to the Commission's Notice of Inquiry in the above-captioned docket.

PRELIMINARY STATEMENT

As expressed in its preamble, the fundamental goal of the Telecommunications Act of 1996 is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The Act reflects Congress's reaffirmation that the discipline of the competitive marketplace is a better protector of consumers' interests and a more effective spur to technological innovation than any regulatory dictate. In particular, Congress recognized that the advanced packet-switched data networks and Internet services representing the future of telecommunications "have flourished, to the benefit of all Americans, with a minimum of government regulation," and Congress declared it the policy

of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." 47 U.S.C. §§ 230(a)(4), (b)(2).[1/]

Congress also recognized that packet-switched networks and other digital technologies would continue to advance and would soon enable customers to send and receive new voice, video, and data services over the same high-speed data channel; technological convergence would erode the boundaries that have separated the different parts of the communications industry, leading players from all sectors to compete with each other in a single market for broadband services. In Section 706 of the Telecommunications Act — enacted to implement Congress's express national policy in favor of bringing new technologies and services to the public, 47 U.S.C. § 157 — Congress directed the Commission to "encourage the deployment on a reasonable and timely basis" of this "advanced telecommunications capability," which it defined in competitor-neutral terms "without regard to any transmission media or technology." Act §§ 706(a), (c)(1). Congress concluded that inappropriate regulation of advanced services could throttle their deployment by discouraging investment, raising deployment costs, or unfairly disadvantaging some competitors or technologies over others — which in turn would deprive Americans of the benefits of these technological advances. Thus, it further directed the Commission to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion" and, if not, to "take immediate action to accelerate deployment of such capability by removing barriers to

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[1/] Importantly, when Congress talks about preserving the unregulated nature of the "Internet" industry, it means the provision of the underlying "interoperable packet switched data networks," not just the Internet access or content industries. 47 U.S.C. § 230(e)(1).

infrastructure investment" — action that would include "regulatory forbearance." Id. §§ 706(a)-(b). The primary concern of Congress is that regulation not stifle technological development or stand in the way of citizens receiving these new technologies.

The Commission's Notice of Inquiry launching this investigation correctly acknowledges that what have heretofore been different technologies providing different services are now rapidly converging, and that the current sector-by-sector approach to regulation does not fit well with a world in which providers from historically distinct sectors of the industry compete in a single market for broadband services. But whereas Congress professes faith in an "unfettered" marketplace for advanced services, 47 U.S.C. § 230(b)(2), the Notice appears to proceed from the assumption that sector-by-sector regulation will continue for the indefinite future. Accordingly, the largest part of the Notice looks at each group of communications companies in isolation, assumes that their new broadband offerings are nothing more than extensions of the basic services currently offered by different classes of providers, and asks how the regulations that apply to those basic services can be extended to the advanced ones. Rather than focus on how to encourage the competition among broadband technologies that would make regulation unnecessary, the bulk of the Notice tends to treat each type of technology as a separate marketplace that must be managed using the traditional regulatory tools of that sector.

Such an approach, which proceeds on the assumption that regulation can direct technological development as well as the free market does, will fail to realize Congress's procompetitive and forward-looking goals. First, it favors individual competitors over competition. Companies that have their roots in a lightly regulated sector will have a permanent, artificial advantage over companies coming from a highly regulated sector, even though both

may provide identical or substitute services. Indeed, the Notice all but dismisses the contributions of the one sector — incumbent LECs — whose ability to invest and innovate has been most severely harmed by regulation. Second, it stunts inter-sector competition by discouraging entry. An incumbent LEC, for instance, will have sharply reduced incentives to use VDSL technology to provide multichannel video service in competition with a Title VI cable incumbent if that technology, once deployed, would be subject to regulation as a telephone exchange or exchange access service. Finally, the Notice's single-minded focus on opening individual sectors of the market to competition will sacrifice the deployment to "all Americans" that is a core goal of Section 706. The Notice's approach may help lucrative urban and business customers obtain additional new services, but only at the cost of introducing regulatory inefficiencies that harm the country as a whole.

As it begins to consider these new technologies and services, the Commission must be careful to avoid interpreting the Telecommunications Act in a manner that stunts the very broadband competition that Congress hoped to further. The following principles should guide Commission policy:

1. The Commission's primary goal should be to encourage the development of a unified, "converged" market for digital broadband services, in which robust competition among different networks and network technologies prevents any competitor from having bottleneck control over the "last mile" and makes market regulation unnecessary. This requires giving all network providers maximum freedom to develop and deploy broadband services that enable them to enter new sectors of the marketplace. The Commission must not be so zealous about using regulation to encourage multiple providers in individual sectors of the marketplace that it ultimately sacrifices the competition among sectors that would obviate the need for regulation altogether.

2. Broadband network providers should be required to make only "essential" facilities available to their competitors, and then only for as long as those facilities remain bottlenecks. A facility is not "essential" if (i) the facility itself is competitively available from sources other than the incumbent, or (ii) there are functional substitutes for that facility.

3. Rules should be competitor- and technology-neutral. Competitors that provide the same services should be regulated the same way, regardless of the technologies they use or the sectors of the industry they come from. The Commission cannot and should not pick winners and losers, and it should not regulate on the basis of predictions as to what direction future innovations will take. Instead, the Commission should ensure that historical regulatory classifications do not hamper technological advances.

4. The Commission must ensure that all Americans can receive the benefits of advanced technologies, not just businesses or individuals in urban areas; and it must further ensure that its actions do not limit the classes of citizens who will see the benefits of these technologies. Congress expressly directed the Commission to lift any regulatory barriers that prevent carriers from deploying digital infrastructure broadly. Regulations that make it too expensive for carriers to bring advanced services to smaller and rural markets violate this directive, even if those regulations marginally further competition in business and urban markets.

The Commission has structured its inquiry around three questions: What is advanced telecommunications capacity; is that capacity being deployed on a reasonable and timely basis to all Americans; and how does regulatory policy affect the pace of this deployment? We address each question in turn.

I. "ADVANCED TELECOMMUNICATIONS CAPABILITY" IS INCREASINGLY PROVIDED BY MANY COMPETITORS USING DIFFERENT TECHNOLOGIES IN A SINGLE MARKET FOR BROADBAND SERVICES.

Virtually every sector of the communications industry has announced ambitious plans to deploy high-speed data transport services in the immediate future. Incumbent cable operators are upgrading their systems to a hybrid fiber-coax architecture and rolling out cable

modem services bundled with proprietary Internet access and content services. These services now have 350,000 residential subscribers nationwide, with that number expected to grow to 2 million by the end of 1999 and 12.8 million by 2002.[2/] Indeed, recent multibillion-dollar investments in cable by companies such as Microsoft, Compaq, and AT&T, and individuals such as Paul Allen represent significant bets that cable modems soon will become the dominant method for delivering broadband across the last mile.[3/] In addition, DBS providers such as Hughes are providing downstream high-speed data services right now,[4/] and multiple full-broadband satellite networks — including Iridium, GlobalStar, Teledesic, SkyBridge, and ICO — are expected to come on-line over the next three years.[5/] Fixed wireless providers, such as

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2/ See "High-Speed Internet Access To Reach 16 Million U.S. Households by 2002," Forrester Research, <http://www.forrester.com/press/pressrel/98901.htm>. Moreover, cable modem services are available to an extremely large customer base. The eighteen cable MSO affiliates of @Home, for example, enable @Home to reach over 60 million households. See "@Home: Fast Growth, Fast Friends," PC Magazine 127 (Sept. 22, 1998). The MSO affiliates of Road Runner reach another 27 million homes. See Timothy Hanrahan, "Cable-Modem Service Road Runner Claims 100,000 Subscribers in U.S.", Wall St. J. Interactive Ed., <http://interactive.wsj.com/edition/articles/SB902158203406719500.htm>.

3/ See, e.g., "Microsoft, Compaq Round Out RoadRunner Investment," <http://www.internetnews.com/isp-news/1998/06/1502-microsoft.html>; Tom Valovic, "The AT&T/TCI Deal: A Defining Event in Telecom?," Telecom. at 6 (Aug. 1, 1998); Morris Edwards, "High-Speed Access Kicks It into High Gear," Comm. News at 98 (Aug. 1, 1998); "Paul Allen Plans to Use Cable TV Plant To Offer Advanced Services," Comm. Bus. & Fin. at 5 (Aug. 17, 1998).

4/ See Bob Metcalfe, "Hughes Satellite Gives Telcos, TV Companies Needed 'Net Competition," InfoWorld, Oct. 28, 1996, <http://www.infoworld.com/cgi-bin/displayArchives.pl?dt_iwe44-96_28.html>.

5/ See Gary L. Garriot, "Low Earth Orbiting Satellites and Internet-Based Messaging Services," <http://www.specialty.com/hiband/satellite_index.html>. Last year, the International Bureau granted licenses to thirteen potential Ka-band satellite providers enabling them to provide "desktop-to-desktop videoconferencing, electronic messaging and facsimile,

(continued...)

WinStar Communications, in the 24, 28, and 38 GHz bands are deploying ATM point-to-multipoint networks that enable them to carry local and long-distance voice, data, and video and provide high-speed Internet access.[6] Sprint has announced, and AT&T reportedly will soon announce, plans to deploy nationwide ATM fiber networks capable of providing the same mix of services.[7] Wireless cable providers are also extending their operations to provide broadband services.[8]

Wireline local exchange carriers have also announced plans to deploy advanced telecommunications capability — most notably, digital subscriber line technologies ("xDSL") that use additional electronics to enable existing copper loops to carry data at multi-megabit speeds. Analysts predict that 2.5 million xDSL lines will be in use by 2001.[9] Notwithstanding

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[5] (...continued)
direct-to-home video, distance learning and corporate training, Internet access, telemedicine, electronic transaction processing, satellite news gathering," and other broadband services. "International Bureau Grants Licenses for 73 New Ka-Band Satellites," IN 97-12 (rel. May 9, 1997) (listing licensees).

[6] See, e.g., "WinStar Expands Point-to-Multipoint Demonstration Network in Washington, D.C.," Business Wire, Sept. 1, 1998, <http://biz.yahoo.com/bw/980901/winstar_1.html>.

[7] See "AT&T Sees Need for Speed: Telecom Giant Reportedly Set To Unveil High-Speed Network for Businesses," CNNfn, Sept. 10, 1998, <http://cnnfn.com/hotstories/companies/9809/10/att>; Jack Richard, "Sprint Drops Another Pin," Boardwatch Magazine, Aug. 1998, <http://boardwatch.internet.com/mag/98/aug/bwm57.html>.

[8] See Wireless Communications Association International, "Take a Second Look at Wireless Cable," Nov. 28, 1997, <http://www.wcai.com/Marktech.htm#articleMarHigh98>. In addition, the Commission has announced that at its next open meeting on September 17, it will consider action to give MMDS and ITFS licensees increased flexibility to provide two-way digital services.

[9] See Center for Telecommunications Management, "ADSL: Prospects and (continued...)

the Notice of Inquiry's unwarranted skepticism regarding the abilities of incumbent LECs to deploy these new technologies (see, e.g., Notice ¶ 21),[10/] U S WEST is working hard to bring broadband to market. U S WEST is in the process of deploying asymmetric digital subscriber line services (capable of transporting data at speeds of 256 kbps to 7 Mbps) in 226 wire centers in forty-three cities across its fourteen-state service region; as of today, it has deployed ADSL in 215 of these wire centers.[11/] Moreover, contrary to the Notice's suggestion that "[m]ost incumbent LECs . . . have avoided entering other territories or the MVPD market" (Notice ¶ 27),

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9/ (...continued)
Possibilities," ADSL Forum, Jul. 1998, <http://www.adsl.com/mrp_exec_summary.html> (citing International Data Corporation forecast).

10/ Apart from betraying Congress's principles of competitor- and technology-neutrality, such skepticism ignores actual experience. Where regulators have not impeded RBOCs from innovating and investing in the enhanced services market, for example, their participation has had indisputable economic benefits. RBOC entry into and innovations in providing voice messaging and enhanced fax services created mass markets to the benefit of all competitors and customers. An analysis by Booz-Allen & Hamilton submitted in the Computer III docket demonstrated that RBOC entry into these services brought their prices down dramatically, causing demand to explode and transforming these services from niche large-business services into mass-market residential and small-business services. See Booz-Allen & Hamilton, Inc. The Benefits of RBOC Participation in the Enhances Services Market III-5 to III-7 (1995). It was the RBOCs who first marketed these services to low-income and minority customers, again creating new opportunities for the marketplace as a whole. See id. at III-9. Booz-Allen confirmed the continuing validity of these conclusions last year. See Letter to Frank Hatzenbuehler, U S WEST, from Robert G. Docters, Booz-Allen & Hamilton, Inc., dated Sept. 2, 1997. Copies of this letter and the original study are attached as Attachment A. Of course, to the extent that the Commission adopts rules that actively discourage incumbent LEC investment and innovation, the Commission becomes the active agent of its own skepticism.

11/ For a more detailed description of the scope of this deployment, see "U S WEST Turns on Nation's First Mass-Market, Multi-City Deployment of Ultrafast ADSL Internet Service," May 4, 1998, <http://www.uswest.com/com/insideusw/news/050498/index.html>; "U S WEST To Launch Second 20-City Wave of Lightning-Fast ADSL Internet Service," June 5, 1998, <http:www.uswest.com/com/insideusw/news/060598.html>.

U S WEST has aggressively pursued these opportunities. U S WEST was the first Bell company to offer interLATA data transport services in competition with interexchange carriers' services outside of its service territory, and its !nterprise networking unit is now the third-largest provider of frame-relay services nationwide. U S WEST has also entered into alliances with Qwest and Williams Communications to build an intercity broadband network that will serve the top eighty markets outside its region. In addition, U S WEST has been granted a franchise from the cities of Phoenix, Scottsdale, and Gilbert, Arizona to provide digital multichannel video and on-line services over subscribers' telephone lines using very high speed digital subscriber line ("VDSL") technology, in direct competition with incumbent cable operators.[12/]

Although each type of company just described employs a different transmission and last-mile technology — and each comes from what is now considered (and regulated as) a different sector of the communications industry — the development of standard protocols for switching, routing, and video and audio compression means that every one of these companies can provide "advanced telecommunications capability" that "enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." Act § 706(c)(1). All of these providers compete in a single, converged market for digital broadband services because they all offer end users essentially the same thing: high-speed transmission of information

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12/ For a description of these services, see "U S WEST Announces Nation's First Fully Integrated Digital TV and On-Line Service that Provides Cable TV Programming Over Existing Phone Lines," Apr. 20, 1998, <http:www.uswest.com/com/insideusw/news/042098a.html>.

packets.[13] Indeed, by defining "advanced telecommunications capability . . . without regard to any transmission media or technology," Act § 706(c)(1), Congress itself acknowledged that digital services delivered by different providers over different technologies were substitutes for one another in a single market, even if sixty years' worth of regulations have treated those providers and technologies differently.

Congress's assessment has been borne out by experience. In Phoenix, Arizona, for example, robust facilities-based competition among broadband providers from different sectors of the industry has developed particularly quickly — the result of the competitive pressures that each provider puts on the others to invest in advanced facilities, not of any regulatory mandate. Notwithstanding their different technologies and traditional regulatory categories, these providers rightly perceive that they compete head-to-head with one another in the same markets for residential and business high-speed data services:[14]

- U S WEST !nterprise offers residential and business end users in Phoenix digital subscriber line services (branded "MegaBit services") at speeds ranging from a symmetrical 256 kilobits per second to an asymmetrical 7 megabits per second downstream/1 megabit per second upstream connection. Prices start at $ 40 per month and increase with greater speeds, with a set-up charge of $145. As noted above, U S WEST has also received a local franchise to deploy a higher-speed

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13/ See, e.g, Barbara Esbin, Internet Over Cable: Defining the Future in Terms of the Past, OPP Working Paper Series 30, at 112 (1998) ("The communications and communications services made possible by the Internet are fundamentally unlike those provided in the past over the technologically separate public switched telephone network, data networks, broadcast networks, and cable television systems in that a single medium is capable of delivering nearly any type of communications service on an integrated basis."); Mem. Op. and Order, Deployment of Wireline Services offering Advanced Telecommunications Capability, CC Dkt. No. 98-147 et al., at ¶ 6 (rel. Aug. 7, 1998) (hereinafter, "Advanced Services Order").

14/ See Reinhardt Krause, "Will Phone or Cable Rise from Rivalry in Phoenix?", Investor's Business Daily at A8 (Jul. 15, 1998).

digital subscriber line technology, VDSL, to provide digital, Title VI multichannel video programming and on-line services in direct competition with the incumbent cable provider, Cox Communications.

- Cox, in turn, has deployed @Home and @Work cable modem services, directed to residential and business users respectively. @Home offers potential speeds of 3 megabits per second downstream and 1.5 megabits upstream, but actual speeds are lower during peak times (in the range of 200-300 kilobits per second) because this capacity is shared among all users on the node.[15/] These services cost $44.95 per month for cable subscribers and $54.95 per month for nonsubscribers, with a standard set-up charge of $149.95.[16/] By April 1998, @Home had approximately 3,000 subscribers in Phoenix[17/] and was available to 250,000 customers.[18/] In addition, Cox is beginning to roll out digital local telephone services over its system.[19/] Cox operates more than 9,200 miles of cable infrastructure in Phoenix, and passes more than 1 million homes.[20/]

- Hughes offers a high-speed data service called DirecPC to its digital broadcast satellite subscribers, which combines a satellite-delivered downstream channel of up to 400 kilobits per second with a 33 kilobit per second telephone upstream channel. The service costs $39.95 to $129.95 per month depending on speed, with an initial charge of approximately $450.[21/]

- People's Choice TV, a 2.5 GHz wireless cable provider (MMDS), offers Phoenix business and residential users a service called SpeedChoice, with a shared 10

15/ See <http://www.home.net/home/speed.html>.

16/ See <http://www.phx.cox.com/internet/cox@home/pricing.html>. These prices include lease charges for the cable modem. The monthly charge drops by $15 if the customer purchases the cable modem for $400.

17/ "City's Initial Cable Service Replaces TCI," Arizona Daily Star at 10A (Apr. 3, 1998).

18/ "U S WEST Service Integrates TV and Internet," Internet World at 8 (Apr. 27, 1998).

19/ See Lisa Gonderinger, "Cox Phone Service Debuts Near ASU," Arizona Republic at 11 (Aug. 28, 1998).

20/ See <http://www.cox.com/systems/phoenix.html>.

21/ See <http://www.direcpc.com>.

megabit per second downstream data channel received over a microwave dish, combined with a 33 kilobit per second telephone upstream channel. The service costs $44.95 per month with a nonrecurring charge of $199, or $149.95 with a twelve-month contract.[22] A second 2.5 GHz MMDS provider, UltimateCom, has announced plans to offer similar data services in Phoenix in the near future.[23]

- At the highest end of the market, the five largest facilities-based CLECs in Phoenix — Electric Lightwave, GST Telecommunications, MCI, MFS WorldCom, and Teleport Communications Group — are providing businesses with high-speed access and dedicated transport using over 800 route miles of fiber they have deployed in and around the city. These CLECs have captured 20% of the wholesale market for high-capacity services in Phoenix (defined as DS1 or greater transport), and, together with resellers, fully 70% of the retail market. These CLECs are also capturing more than half of the yearly growth in these services, meaning that their market shares will continue to increase in the future.[24] Although they are now serving high-end business customers exclusively, the CLECs' ability to quickly extend their activities downmarket constrains prices in those other market segments as well.

- Three of the largest fixed wireless competitors hold significant spectrum in Phoenix and have similarly announced plans to enter the market for high-capacity voice and data services. WinStar, which claims to be the largest holder of spectrum in the United States, holds 700 MHz of spectrum in the 38 GHz band and plans to begin offering data and local telephone services in Phoenix by the end of the year.[25] Advanced Radio Telecommunications ("ART") holds 100 MHz of spectrum and is targeting carrier customers.[26] Teligent holds 400 MHz of

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22/ See <http://www.speedchoice.com>.

23/ See <http://www.ultimatecom.com>.

24/ See Quality Strategies, U S WEST High Capacity Market Study: Phoenix Metropolitan Statistical Area 3-4 (1998). This study is attached as Attachment B.

25/ See <http://www.winstar.com/indexBusServ.htm>. WinStar is planning a nationwide deployment of a point-to-multipoint system that offers up to four DS3 capacity circuits per 100 MHz channel. See <http://www.winstar.com/indexNews.htm>.

26/ ART offers transmission speeds from 28.8 kbps through T1 and T3 speeds. In April, WinStar agreed to purchase 14.9 % of ART.

spectrum in the 24 GHz band in Phoenix and plans to offer integrated voice and data services to business customers.[27]

The fact that these providers must operate at similar price points for similar speeds (beginning at $40-$50 per month for residential access) demonstrates that each provider's activities are constrained by competition from the other high-speed data providers, even though all of the providers are employing different technologies.

Indeed, these services operate in a single market for broadband that should be regulated (and deregulated) as such. The merger guidelines of the Department of Justice and Federal Trade Commission define the scope of a market by testing whether "a hypothetical profit-maximizing firm that was the only present and future seller of [a] product[] . . . likely could impose at least a 'small but significant and nontransitory' increase in price." 1992 Horizontal Merger Guidelines, 1992 Horizontal Merger Guidelines § 1.11, 57 Fed. Reg. 41552, 41555 (1992). In other words, if a hypothetical sole supplier of a particular product or service could significantly influence its price or output, the product or service constitutes the relevant market by itself. See IIA Phillip E. Areeda, et al., Antitrust Law ¶ 533, at 170 (1995). If the sole supplier could not control price or output, the relevant product market also includes other products or services that are substitutes for that product or service. See id.; Merger Guidelines § 1.11, 57 Fed. Reg. at 41555. Once the grouping of products and substitutes is sufficiently broad that a hypothetical sole supplier could control the price without a significant number of

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27/ Teligent plans to offer transfer rates up to 1.544 Mbps. See <http://www.teligent.com/index.asp>.

customers leaving for alternative services, that grouping defines the boundaries of the relevant market. See Merger Guidelines § 1.11, 57 Fed. Reg. at 41555.[28]

Plainly, no provider of a particular type of digital broadband service in Phoenix possesses such power over its price. Where comparable transmission speeds are offered, a customer does not care whether bits are delivered to his home via a telephone company's xDSL service, a cable modem, various wire technologies, or any other system. Price is the key variable. Thus, if Cox were to raise the price of its high-capacity cable modem service by a "small but significant and nontransitory" amount, customers would instead choose U S WEST's MegaBit service, or another substitute, and vice versa. Digital broadband services therefore are part of a single market, even though current Commission regulations treat them otherwise. It is critical that the Commission recognize the realities of this market, and work towards a deregulatory structure that treats all broadband services equally, regardless of how or by whom they are provided.

II. BROADBAND SERVICES ARE NOT BEING DEPLOYED TO ALL COMMUNITIES AND CUSTOMERS EQUALLY.

Section 706 of the Act charges the Commission with the duty to ensure that advanced telecommunications capability is deployed to all Americans in a reasonable and timely fashion. Act §§ 706(a), (b). Although it is true, as described in the previous section, that many different companies are beginning to develop and deploy advanced telecommunications

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[28] Suppliers of the relevant service for purposes of this analysis include not only current service providers but also "uncommitted entrants" — firms that would rapidly enter the market in response to a price increase. See Merger Guidelines § 1.32, 57 Fed. Reg. at 41556.

capability, it is also the case that these activities are not proceeding uniformly across the nation. There is a significant gulf between wealthy urban areas that have access to advanced services, such as downtown and suburban Phoenix, and rural and inner-city communities that lack such access. Current Commission policies will only make this gulf grow wider.

As U S WEST demonstrated in its original Section 706 Petition for Relief (a copy of which is appended hereto as Attachment C), rural Americans face an acute shortage of data bandwidth. The infrastructure of the Internet is not evenly distributed across the country. The high-speed links of the network connect only the largest cities. See U S WEST Petition at 9. U S WEST's 14-state region has only a handful of high-speed (DS3 or above) points of presence ("PoPs"). As a result of the underdevelopment of Internet backbone, providers of advanced services have been forced to concentrate on urban areas and businesses. An ISP in a smaller market cannot offer subscribers advanced services if its only affordable connection to the Internet is a congested pipeline that is relatively slow to begin with. See U S WEST Petition at 23.

Because of its existing facilities and mass-market focus and experience, U S WEST is well positioned to bring broadband services to communities and demographics not readily served by others. To date, however, U S WEST has had to limit its own rollout of advanced services to the forty-three largest cities in its service area. The high cost of deployment, particularly in light of the regulatory obstacles with which U S WEST must contend (unbundling, price cap regulations, interLATA restrictions, and so on), has impeded further deployment.

Since the filing of U S WEST's Petition for Relief, the situation of smaller and rural communities has not improved. According to the most recent Boardwatch Magazine

survey,[29] the largest backbone networks still have deployed only a handful of DS3 or greater PoPs in U S WEST's region. Only one new city in the region — Des Moines, Iowa — has received a high-speed PoP, meaning that sixteen out of U S WEST's twenty-seven LATAs still lack any kind of high-speed Internet PoP at all. At a time when the information highway in many areas is growing by leaps and bounds, the stagnancy in much of U S WEST's region underscores the fact that advanced services are not being deployed to "all Americans in a reasonable and timely fashion." Act § 706(b).

Several examples from U S WEST's region further illustrate the seriousness of the problem and the barriers to progress posed by regulations intended for POTS. Customers in many parts of Colorado, for example, find that they are simply unable to obtain affordable access to advanced services. In Denver, the University of Colorado Health Sciences Center and University Hospital provide invaluable medical consultations and educational and research services — telemedicine — to rural areas throughout the Rocky Mountain region. The cost of the network infrastructure the University needs varies tremendously depending on whether LATA boundaries prevent U S WEST from providing the desired facilities. Direct U S WEST-provided connections linking the University and Grand Junction (a distance of approximately 202 miles), and Grand Junction and Cortez (approximately 102 miles) cost the University $2,800 per month and $1,800 per month, respectively. By contrast, the link between the University and Trinidad (approximately 180 miles) costs the University $3,800 per month — because it involves an IXC-provided facility that spans the LATA boundary.

29/ See <http://www.boardwatch.com/ISP/backbone.html>.

Colorado Mountain College's network deployment is likewise hampered by the distorted and inefficient pricing of facilities and services, which U S WEST could ameliorate if permitted. The College has invested heavily in a state-of-the-art interactive video system that links students and teachers who are separated by distances that may exceed 100 miles. Almost half of the monthly budget of $13,756 for the communications network is consumed by a single connection from Glenwood Springs to Leadville, because that connection crosses a LATA boundary. While the distance between the two cites is only 59 miles, the IXC that supplies the link routes data traffic through Colorado Springs, its nearest PoP, extending the length of the link to 255 miles and elevating the monthly cost to a staggering $6,600. If U S WEST were allowed to build a direct link between Glenwood Springs and Leadville, the College would pay approximately $1,570 per month. With that change alone, the College's communications budget would fall 37%.

Finally, U S WEST recently installed frame relay service to 26 elementary and secondary schools operated by the Bureau of Indian Affairs in extremely rural parts of Arizona and New Mexico, bringing these students high-speed Internet access and distance learning programs. Regulatory barriers that applied in one state, however, made this deployment significantly more expensive than in the other. In New Mexico, a single-LATA state, U S WEST could provide the schools with cost-effective end-to-end connections in conjunction with some rural independent telephone companies. The existence of a LATA boundary dividing southern Arizona, on the other hand, meant that an IXC had to provide several links of the network. Use of the IXC raised the cost of connecting four schools in rural Arizona by $3,244 per month. This

expense would not have been necessary if U S WEST had been permitted to deploy its network across the boundary.[30]

III. THE COMMISSION SHOULD LIFT REGULATIONS AND CORRECT REGULATORY DISPARITIES THAT DISCOURAGE THE DEVELOPMENT OF INTER-SECTOR COMPETITION AND SLOW THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS.

As the Commission recognized in seeking comment on the relationship between regulation and the deployment of advanced telecommunications capability, regulatory policy remains one of the key determinants of investment decisions by incumbents and new entrants alike, even in this era of converging markets. Regulatory inefficiencies override market and technological incentives and divert investment from its first, best use. Accelerating the pace of infrastructure investment and innovation requires reducing the role of regulation and allowing companies to determine what services to provide to whom in consultation with their marketing experts and engineers rather than their attorneys. In short, the Commission must live up to its commitment in its advanced services Memorandum Opinion and Order "to ensur[e] that incumbent LECs" and other providers "make their decisions to invest in and deploy advanced telecommunications services based on the market and their business plans, rather than regulation." Advanced Services Order ¶ 13.

30/ While U S WEST is permitted to cross LATA lines to provide Internet service over dedicated facilities to elementary and secondary schools, see 47 U.S.C. § 271(g)(2), this provision is of limited usefulness in practice: As was true in the situation described in the text, it is usually not economically feasible to construct dedicated facilities to serve a school without being able to use the facilities to serve any other customers.

A. The Commission Should Not Regulate a Converged Marketplace.

The Notice of Inquiry properly recognizes that many facilities-based providers from historically different (and differently regulated) sectors of the communications industry are beginning to compete with one another in a single market for advanced telecommunications capacity. But the Notice sends mixed signals about what this development means for the future of communications regulation. On the one hand, the Notice asks how broadband services can best be shoehorned into one or more of the traditional regulatory categories (see, e.g., Notice ¶ 77) and whether the Commission should use the old regulatory tools of each sector to create sweeping new network access rights for additional groups of companies, such as Internet service providers. See, e.g., id. ¶¶ 37-38 (proposing extensions of incumbent LEC regulation), 79 (same for other last-mile providers). On the other hand, the Notice recognizes that, "[i]f there is true choice in the supply of last miles," perhaps no economic regulation (other than antitrust law) is needed at all. Id. ¶ 81.[31]

The latter approach — to leave advanced services in the hands of the free market, as with the Internet — is the right one. Technological convergence creates a marketplace that can regulate itself by eroding bottlenecks, increasing the number of facilities-based competitors, and sharpening competitors' incentives to invest and innovate. Such a marketplace protects the

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[31] In addition, the Notice asks commenters "to consider the Internet industry as a model of what a maturing market for advanced telecommunications capability and advanced services might be." Id. ¶ 80. That, of course, is an industry that Congress has found to have "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). U S WEST agrees that the potential for robust competition among many broadband technologies and providers makes the Internet industry an appropriate model for the advanced services marketplace.

interests of both consumers and upstream providers, such as ISPs, that use other companies' facilities as inputs for their services. The Commission should recognize that it must step back from the marketplace as convergence progresses. As it examines the market in these early days of convergence, the Commission should resist the temptation to interfere with this progress by creating new regulatory mandates that distort investment incentives and harm consumers.

Technological convergence increases the number of competitors in the marketplace by increasing the number of technological and transport modalities for providing any given service, and by automatically increasing the number of providers of any given functionality. Any competitor that can move bits sufficiently quickly to and from end users can provide a full complement of digital voice, video, and data services. Convergence also prevents any one competitor from having bottleneck control of the "last mile" to end users — the only source of leverageable market power that could possibly serve as a predicate for continued regulation. As the situation in Phoenix demonstrates, where there are multiple, facilities-based providers, competitive pressures constrain the market behavior of each provider, spur competitors to innovate and invest, and guarantee customers competitive prices and the broadest array of advanced new services. Economic regulation in such a market not only is unnecessary; it is affirmatively harmful because it introduces inefficiencies that decrease consumer welfare.

Technological convergence also protects the interests of upstream providers, such as ISPs, that rely on other companies' "last miles" to provide service. Regulation is not needed to ensure that ISPs can purchase the ability to establish direct "dial up" subscriber connections over a last-mile provider's network. These providers have strong incentives to provide such connections. For example, U S WEST offers a service called "MegaCentral" to ISPs (and other

network hosts, such as corporations with telecommuters) that allows them to send and receive xDSL traffic directly to and from subscribers. MegaCentral begins at only $455 per month for a 1.544 Mbps connection. As a commercial matter, U S WEST must offer ISPs MegaCentral on reasonable terms, and ensure that they have access to MegaCentral on the same terms as U S WEST's own Internet access service, or they simply will turn elsewhere for the product. And the development of competition among multiple last-miles puts more power in the hands of the ISPs, who have the ability to channel their direct-dial customers to one last-mile provider or another.[32] Therefore, this segment of the market, too, can regulate itself without government intrusion.

B. The Commission Should Encourage the Development of Inter-Technology Competition by Permitting Companies To Enter New Markets Without Being Subject to the Regulations of Their Markets of Origin.

In determining how to deregulate advanced services, the Commission's primary goal should be to encourage the development of the technologically converged marketplace described in the previous section, because that market will be able to police itself without regulatory intervention. Achieving this goal depends on enabling network providers operating in one sector of the industry to enter and compete in new sectors, since it is the competition among last-mile network technologies that is eroding the bottlenecks. And this requires a regulatory climate that gives existing providers of last miles the freedom and incentive to invest in the network upgrades needed to expand the scope of their service offerings.

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[32] The Commission should not underestimate the brand power of an AOL with 13 million subscribers or even a smaller ISP with a local following. If a last-mile provider does not permit a customer to reach his chosen ISP, the customer simply will not use that technology and will instead choose a different last-mile provider.

The problem is that regulation to date, which reflects the historical development of the telecommunications industry,[33] has never contemplated the possibility of such inter-sector competition. Instead, the Commission's rules have focused on each segment of the communications marketplace in isolation, and have singlemindedly used the tool of more regulation to level the playing field within each segment by requiring the incumbent providers in a segment to unbundle their networks for third parties or provide them with other access rights.

Moreover, recent Commission statements and actions suggest that it may carry this same regulatory approach forward to new broadband services. Fully two thirds of the Notice of Inquiry is devoted to reviewing each separate sector of the industry and asking how providers in each sector can be regulated to give competitors maximal access to those providers' new broadband services and facilities, as if the new services were nothing more than simple extensions of the providers' basic services and networks. For example, the Notice addresses incumbent LECs' provision of multichannel video services simply as an add-on to their more traditional services, rather than as a potentially serious challenge to the market power of incumbent cable providers in the MVPD market. Compare Notice ¶ 27 with id. ¶¶ 39-41. Likewise, in its advanced services Memorandum Opinion and Order, the Commission broadly suggests that "advanced services offered by incumbent LECs are either 'telephone exchange service' or 'exchange access'" subject to Section 251(c) unbundling and discounted resale,[34] notwithstanding that incumbent LECs are using xDSL technologies to provide services that bear

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[33] Indeed, often the market segments themselves are the artifacts of regulation, as is the case with information service providers.

[34] Advanced Services Order ¶ 40.

no resemblance to traditional telephone services — including, in U S WEST's case, VDSL-based multichannel video programming services and attendant on-line services that Congress plainly exempted from Title II regulation.[35/]

This approach ignores Congress's instruction that the Commission move to reduce, and not dramatically expand, its regulation of advanced services. It also makes for bad technology policy. A sector-by-sector approach results in a singleminded focus on giving competitors within each segment of the market a mandatory, unrestricted access to the investments and innovations of that sector's incumbents, which destroys the incumbents' ability and incentive to expand their activities into other market segments. A LEC is very unlikely, for example, to make the massive investments and network upgrades needed to deploy VDSL-based multichannel video services in competition with incumbent cable providers if those services are treated as simply a new kind of incumbent LEC service and the investment must accordingly be handed over to competitors at cost. Commissioner Powell accurately described the fallacy of this approach to regulation:

35/ The 1996 Act added a new part to Title VI, captioned "Video Programming Services Provided by Telephone Companies." Congress amended the definition of a "cable system" to include LECs' telephony plant, where such plant is used to provide video programming. See 47 U.S.C. § 522(7)(C) (defining "cable system" to include "a facility of a common carrier . . . to the extent that such facility is used in the transmission of video programming directly to subscribers"). The amendments also make clear that multichannel video services provided over such telephony plant are to be regulated under Title VI, see id. § 571(a)(3)(A), and Congress specifically exempted these services from Title II unbundling obligations. See id. § 571(b) ("A local exchange carrier that provides cable service through a . . . cable system shall not be required, pursuant to title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers"). On-line services that LECs provide in conjunction with video programming over these telephony-plant "cable systems" are also Title VI services, for the very same reason that cable modem services fall under Title VI. See Esbin, supra note 13, at 87.

> Like the beautiful poppy fields that lured Dorothy and her traveling companions to sleep in the Wizard of Oz, the constant mantra that we must 'level the playing field' threatens to lull regulators into thinking that we are doing the hard work of ceding control to the market when we are actually extending regulatory burdens to new or non-traditional providers of services unnecessarily.[36]

The only sustainable strategy in the long run is to give facilities-based network providers in each market segment the freedom and incentive to compete with incumbents in other segments, thereby encouraging facilities-based competition in all markets and at all levels of the network, including the "last mile."

Requiring competitors to carry their basic service regulations with them as they move into providing advanced services violates principles of competitive and technological neutrality. As noted in Part I, advanced service providers from historically different sectors of the industry may compete in a single converged market for broadband, but under the Notice of Inquiry's approach they would not compete equally. Competitors that have their roots in a lightly regulated segment of the industry would have a permanent, artificial advantage over companies that come from a highly regulated segment, even though both provide identical or substitute services, and even though the highly regulated companies have no market power in these new broadband services.[37] For example, if the Commission were to require incumbent

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36/ Commissioner Michael K. Powell, "Somewhere Over the Rainbow: The Need for Vision in the Deregulation of Communications Markets," May 27, 1998, at 3.

37/ Cf. Advanced Services Order ¶ 10 (recognizing that "the incumbent [LEC] does not currently enjoy the overwhelming power" in xDSL and other advanced services "that it possesses in the conventional circuit-switched voice telephony market" because "incumbent (continued...)

LECs to unbundle the components of their VDSL cable services — an action that would violate Congress's instructions, 47 U.S.C. § 571(b) — it would be picking the winners and losers in the multichannel video and adjunct online marketplaces. The cable incumbent would be able to provide service free from any obligation to unbundle its network and could bundle affiliated ISP services with its high-speed data transmission services, while the LECs would subject to every regulation in Title II despite providing essentially identical services.[38]

The solution is to recognize (as Congress did) that there is a single market for "advanced telecommunications capability," defined "without regard to any transmission media or technology." Act § 706(c)(1). As the Commission staff have acknowledged, this "new statutory category, which speaks not in terms of services and service providers, but of 'capabilities,' may arguably be utilized to develop a new regulatory framework better suited to the fluid types of communications capabilities made possible by the Internet" and the deployment of new broadband technologies that permit the public to access and use the Internet.[39] Congress gave the Commission the tools (and the obligation) to let this new category develop free from the legacy regulations that apply to carriers' basic services.

37/ (...continued)
wireline carriers and new entrants are at the early stages of deploying" these services).

38/ See Esbin supra note 13, at 87 (noting the possibility of "parallel universes" for cable modem and telco online services, which could be "inconsistent with such fundamental communications policy goals as competitive and technological neutrality").

39/ Esbin, supra note 13, at 116.

C. Because Unbundling and Discounted Resale Obligations Depress Carriers' Incentives To Innovate and Invest in Advanced Telecommunications Capability, the Commission Should Limit Those Obligations to Those "Essential Facilities" for Which No Substitutes Are Currently Available.

As the Commission aptly noted in its recent Memorandum Opinion and Order on advanced services, "[o]ne of the fundamental goals of the Telecommunications Act of 1996 . . . is to promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, in order to stimulate competition for all services, including advanced services." Advanced Services Order ¶ 1. The fundamental role of investment and innovation in the deployment of advanced services is made clear by the language of Section 706 itself: If the Commission determines in this inquiry that advanced services are not adequately available, it "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment . . . ." Act § 706(b) (emphasis added). Thus, the role of the Commission in this inquiry is "to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers." Advanced Services Order ¶ 2.

In particular, the Commission must recognize the fundamental economic truth that requiring a broadband network provider to share an innovation or investment with a competitor — whether through discounted resale or unbundling — necessarily diminishes and often eliminates the network provider's and its prospective competitors' incentives to invest. A network provider invests in new facilities (and in research to develop such new facilities) in order to differentiate itself from other market participants. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974) (right of exclusivity in a new technology or product provides "an

incentive to inventors to risk the often enormous costs in terms of time, research, and development"). Government rules that impair the ability of a network provider to attain this differentiation deprive it of the benefit of its expenditure and thereby destroy the incentive to invest. A broadband network provider contemplating an investment in an innovation that it knows cannot be used to differentiate its services has no reason to make the investment. Similarly, a network provider that knows that it alone must bear the costs of any unsuccessful innovations, while being forced to share any resulting benefits, will not risk experimenting with innovations that might not prove successful.

At the same time, permitting rivals to obtain an incumbent network provider's advanced-service facilities at cost on an unbundled basis or the services themselves for resale at a discount inefficiently discourages the rivals from investing in their own facilities. If a competitor can avoid all research and development risks by waiting to exploit the incumbent network provider's innovative services and technologies, and if it can abandon those innovations at any time without cost or risk should they turn out to be less successful in the marketplace than anticipated, the competitor itself is discouraged from experimenting, investing, and innovating. See 3A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 771b (1996) (if the government "order[s] the [incumbent] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether. . . . [Loss of incentive to build] could be extremely serious . . . in the case where either the [entrant] or some other rival could enter the market by some alternative not requiring the sharing of the [incumbent's] facility").

Because forced sharing of innovations undercuts the incentives for all market participants to invest and thereby retards the deployment of advanced services, regulation requiring unbundling and discounted resale must — if applied at all in the context of advanced services — be kept to a minimal scope. In particular, incumbents should be required to provide competitors with access to their facilities and services only where a competitor has a true need to obtain access from the incumbent. That is, as in the closely analogous context of the "essential facilities" doctrine in antitrust law, an incumbent should be forced to turn over a facility for use by competitors only if it is not "available from another source or capable of being duplicated by the [competitor] or others." Areeda & Hovenkamp ¶ 773b; see also MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (prerequisite to requiring a monopolist to turn over an essential facility is "a competitor's inability practically or reasonably to duplicate" the facility); Hon. Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace," 75 Calif. L. Rev. 1005, 1034 (1987) (because "requiring an inventor . . . to give his secrets away to his competitors discourages innovation," courts have required even bottleneck facilities to be turned over to competitors only in rare instances).

Both Chairman Kennard and the Commission staff have recognized that broadband network providers should be required to make only essential or bottleneck facilities available to competitors. In a speech this summer, Chairman Kennard concluded that competition in advanced services requires "[t]hree simple conditions: identify the essential facilities; give competitors access to them; and make sure competing networks can interconnect with one another." William E. Kennard, "A Broad(band) Vision for America," at 6 (June 24,

1998). As he further stated, "[i]f we do this, there is no need for additional FCC regulation of advanced services, whether offered by the incumbent phone companies or by their competitors," because "competition and consumer demand will take care of the rest." Id. at 7. Similarly, in its recently released working paper concerning cable Internet services, the Office of Plans and Policy concluded that "[a]ny regulatory efforts in this arena should begin with an analysis of whether the operator in question exercises undue market power over an essential service or facility necessary to provide an essential service."[40/]

More generally, Congress clearly intended that unbundling be confined to those facilities that a competitor truly needs to obtain from the incumbent in order to compete. In the Title II context, it provided that the Commission "shall consider, at a minimum," whether the failure to provide access to particular network elements would "impair" the ability of requesting carriers to provide service, or, in the case of proprietary elements, whether unbundled access to the elements in question is "necessary." 47 U.S.C. § 251(d)(2) (emphasis added). In articulating these standards, Congress directed the Commission to consider a new entrant's actual need before an incumbent would be required to unbundle any particular element. Section 251(d)(2) shares the same basic thrust as the essential facilities doctrine: whether a competitor is entitled to an incumbent's facilities depends on whether the competitor can reasonably obtain a substitute facility elsewhere or build the facility itself. If a competitor can do so, requiring the incumbent to share the facility serves no procompetitive purpose and indeed undercuts competition by destroying the incentives of the incumbent and entrant to invest and innovate.

40/ Esbin, supra note 13, at 117.

Thus, if the Commission is to apply unbundling and resale obligations in the context of advanced data services at all, those obligations should be restricted to the bottleneck services and facilities that are not readily available from sources other than the incumbent broadband network provider. As noted previously, broadband services are becoming widely available from a multitude of sources. And with respect to xDSL-technology-based services as a class, for example, all the advanced data facilities used by incumbents can be purchased at market prices from independent equipment vendors. Indeed, U S WEST buys its advanced data equipment for xDSL from outside suppliers; competitors could go to those same suppliers and buy the same equipment. As Commissioner Ness recently noted, "[t]he evolving DSL equipment necessary to carry high-speed digital signals on properly conditioned local loops is available to both the ILECs and the CLECs. So is the associated multiplexing and routing/switching equipment necessary to create advanced high-speed data communications services."[41/] Applying unbundling obligations to such readily available equipment has no competitive justification.

Unbundling and discounted resale obligations are therefore appropriate (if at all) only for the narrow class of essential facilities that are currently unavailable to competitors from any other source and for which there are no comparable functional substitutes.[42/] Where

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41/ Commissioner Susan Ness, "To Have and Have Not: Advanced Telecommunications Technologies" at 8 (June 9, 1998).

42/ A corollary of this is that the Commission should regulate a carrier's provision of advanced services only where the carrier has power in the basic services market that it can actually and demonstrably leverage into the advanced services marketplace. The Commission should not automatically assume, for example, that an incumbent LEC's residual market power in voice telephony services necessarily translates into an unfair advantage in the broadband market, where it has almost no market share and technological convergence is fast creating (continued...)

competitors can obtain needed facilities or technological substitutes from other sources — including network providers in other industry segments using different technologies — they may rely on the market and select among the multiple choices it provides (including, of course, the possibility of arriving at a mutually satisfactory arrangement with the incumbent). And because displacing market forces here has such undesirable economic effects, these limited unbundling and resale obligations should last only for as long as facilities remain bottlenecks in fact. Once functional substitutes are available in the marketplace for a given network provider's "last mile," for example, the limited incremental benefits of continuing to impose strict unbundling duties on that provider are far outweighed by the costs of depressing its incentives (and the incentives of new entrants) to innovate and invest in advanced telecommunications capability.

In words that apply equally to all broadband network providers, Chairman Kennard had it precisely right in his speech to the Federal Communications Bar Association:

> To provide the advanced services, telephone companies will have to invest in advanced electronics. But the telephone companies have rightly asked, why should we make this new investment if we simply have to turn around and sell this new service — or the capabilities of these advanced electronics — to our competitors? If the telephone company has opened up its underlying networks to competition, the competitors can invest in the same advanced services. Where networks are open, I see no reason to require discounted resale or unbundling of these new services and advanced technologies that are available to all.

Chairman William E. Kennard, "A Broad(band) Vision for America," at 5 (June 24, 1998).

42/ (...continued)
functional substitutes for its network facilities. Cf. Advanced Services Order ¶ 10.

D. In Its Zeal To Further Competition in Individual Sectors of the Industry, the Commission Must Not Raise the Costs of Providing Service in a Manner That Prevents Broadband Technologies from Reaching Underserved Communities and People.

Although the Commission's Notice undertakes an extremely wide-ranging inquiry, the one factual determination that the Commission is statutorily required to make is "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Act § 706(b) (emphasis added). As U S WEST demonstrated in its initial Petition for Relief and in Part II above, the pace of deployment in residential markets and smaller and rural communities significantly lags that in business markets and urban areas. Competitors have been quick to target densely populated areas such as Phoenix, but outside these areas, the competitive field is virtually empty.

Some degree of disparity is inevitable. High-margin business services and high-income individual users are clustered in urban areas, and — with the exception of future satellite technologies, which have uniform deployment costs — the per-customer cost of building networks always increases as the population density in a market decreases. The Commission cannot change these basic economic hurdles and force broader deployment through "social contracts" (Notice ¶ 71) or by using other regulatory command-and-control measures.

At the same time, the Commission should recognize that its rules often impose additional costs that so raise the bar as to make it insurmountable. Incumbent LECs, for example, have large quantities of fiber deployed throughout their service territories, and their networks reach further into smaller communities than those of any competitor. They also have extensive experience in serving mass markets and smaller and more remote customers. If

incumbents are permitted to take advantage of integrative efficiencies, they can make an economic case for deploying advanced services to more and smaller communities. But given the costs and difficulties inherent in deploying advanced services to less densely populated areas, the extra burdens of current and proposed Commission rules — including the interLATA prohibitions, the unbundling and discounted resale rules, and the proposed separate subsidiary rules — all conspire to decrease the number of communities in which deployment is economically feasible.

Other regulations, such as the Computer II/III CEI-plan rules, bar incumbent LECs from bringing new technologies and services to the public until the Commission grants a specific approval. The approval process results in significant delays: It took the Commission almost eleven months to approve a Bell Atlantic CEI plan for intranet management services, even though that petition was unopposed.[43/] In addition to running afoul of Congress's clear policies favoring the rapid dissemination of new technologies to the public, 47 U.S.C. § 157 and Act § 706(a), such delays result in significant losses of consumer welfare, as pent-up demand for these new services and technologies goes unmet. Economists estimate, for example, that the delays by the Commission and the MFJ court in permitting AT&T and the BOCs to provide voice messaging services cost consumers approximately $1 billion annually in lost welfare,[44/] and

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[43/] See Order, Bell Atlantic Telephone Companies' Offer of Comparably Efficient Interconnection to Intranet Management Service Providers, CCBPol Dkt. No. 98-01 (rel. Aug. 20, 1998).

[44/] See Jerry A. Hausman and Timothy J. Tardiff, Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services 12-15 (1995). A copy of this study is attached as Attachment D.

regulatory restrictions delaying the introduction of cellular telephone services cost the economy approximately $25 billion annually in lost consumer surplus.[45] Consumers surely suffer similarly enormous harms from regulations that prevent carriers from providing them with new broadband and Internet services.

Other regulations also discourage incumbent LECs from investing in infrastructure and bringing new services and technologies to the public. For example:

- The price cap rules, and especially the artificial 6.5% productivity factor, inappropriately divert incumbent LECs' investment resources to the IXCs in the form of lower access charges. And as the Commission is aware, the IXCs do not necessarily pass these reductions on to their residential customers.

- Rules that give preferred regulatory treatment to companies using packet switching rather than circuit switching, including the so-called "ESP exemption," artificially distort technological development and investment. The rules discourage research and investment in circuit-switched technologies that could dramatically reduce costs to consumers and enable them to obtain new services. Packet switching may indeed displace circuit switching in many applications, but the market, not the Commission, should make that decision.

- Commission delays in processing new service applications slow the deployment of new technologies and services to the public. The Commission should expand its use of automatic or time-limited approval processes.

In sum, the Commission has a clear mandate from Congress and the public interest to deregulate. Only if the Commission chooses to limit its regulations to those situations where regulation is demonstrably necessary will all Americans receive the full benefits of market-driven, technological innovation. The Commission should proceed in this Inquiry with a firm intent of eliminating those regulations that, however well-meaning, stunt the development

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[45] See Jerry A. Hausman, "Valuation of New Goods Under Perfect and Imperfect Competition," MIT Working Paper (June 1994).

of a converged broadband marketplace and inhibit companies' incentives to invest in infrastructure and expand their service offerings.

Respectfully submitted,

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ATTACHMENTS
to
Comments of US West Communications, Inc.
in
CC Docket No. 98-146

Tab	Item
A.	Letter to Frank Hatzenbuehler, U.S. West, from Robert G. Doctors, Booze-Allen & Hamilton, Inc., dated Sept. 2, 1997, and the study by Booze-Allen & Hamilton, Inc. The Benefits of RBOC Participation in the Enhance Services Market, (1995).
B.	Quality Strategies, US West High Capacity Market Study:Phoenix Metropolitan Statistical Area (1998).
C.	Petition of US West Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services, filed Feb. 25, 1998.
D.	Jerry A. Hausman and Timothy J. Tardiff, Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services (1995).

EXHIBIT E

10-8-98

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)	CC Dkt. No. 98-146

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

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SUMMARY

The comments filed in this proceeding support U S WEST's observation that technological convergence is creating a single, unified market for broadband services that is making existing regulatory classifications obsolete. They agree that this progress, if allowed to proceed unhindered, will prevent any one provider from having bottleneck control of the "last mile" and make regulation of the marketplace unnecessary. They also recognize that a failure to adapt regulation to the reality of convergence will thwart this progress by discouraging carriers from investing the facilities needed to compete in other segments of the market and by distorting the marketplace in favor of those providers who, by historical accident, compete in the advanced services market unhindered by legacy regulation.

In this reply, U S WEST argues that the Commission must encourage intermodal competition and achieve regulatory parity by *de*regulating all providers of competitive data services and nonbottleneck network facilities. First, the evolving single market for broadband services makes the forward extension of old regulatory classifications untenable. Second, Commission regulations, most notably network access and discounted resale rules, diminish network providers' incentives to invest in infrastructure and deploy advanced capability; accordingly, the Commission should limit the application of these regulations to those few facilities and services for which no functional substitutes are available in the marketplace. Finally, the Commission should reject the ISPs' demand for new regulations of incumbent LECs. There are already extensive protections in place — the *Computer III* and ONA rules — that the Commission has long deemed sufficient to safeguard the interests of enhanced service providers; and the ISPs' unsubstantiated and inflammatory accusations of discrimination obscure the fact that U S WEST has, voluntarily and in good faith, gone well beyond its *Computer III* and ONA obligations to work with state public utility commissions and the ISP community to accommodate ISP concerns.

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U S WEST Communications, Inc. ("U S WEST") respectfully submits these comments in reply to the comments filed in the above-captioned docket.

PRELIMINARY STATEMENT

In its comments, U S WEST observed how technological convergence is fast creating a single, unified market for broadband, and how network providers from historically different segments of the communications industry are starting to compete with one another to provide voice, video, and high-speed data services. Traditional regulatory distinctions among services are rapidly becoming obsolete. U S WEST urged the Commission to set as its first priority the acceleration of this process by freeing all network providers to expand into new segments of the marketplace, by avoiding unnecessary regulation of competitive services and competitively provided facilities, and by lifting rules that discourage providers from investing in and deploying advanced telecommunications infrastructure. The Commission has the opportunity to encourage the development of a sustainable competition among facilities-based providers that will prevent any one of them from having bottleneck control of the "last mile" and will thereby obviate the need for regulatory intervention. Such action also will carry out

Congress's unambiguous command to "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Act § 706(b).

Many commenters have confirmed U S WEST's view. Comments from wireless, satellite, cable, fiber, electricity, and telephone providers attest to the convergence of their service plans and confirm that each is beginning to eye the others' markets. The network providers who are making massive investments in infrastructure to bring this about — including recent converts such as AT&T — agree that unbundling and resale obligations destroy incentives to invest, make it impossible for competitors to differentiate themselves in the marketplace, and force providers to limit the scope of their deployment plans. Many commenters also agree that technological convergence should not be an excuse to extend legacy regulation into competitive markets, and that a blindered focus on how competitors within *particular* market segments interact with each other may short-sightedly sacrifice the competition among *all* potential players and segments that would enable the Commission to step back from the market altogether. Finally, a preponderance of commenters agree with U S WEST that Section 706 is a fundamentally *de*regulatory mandate to the Commission, declaring that the best way to ensure that "all Americans" have access to the Information Age is to free network providers to invest in the infrastructure needed to reach these individuals.

But other commenters seek to cut this proceeding loose from its moorings. Ignoring that Section 706 directs the Commission to "remove barriers to *infrastructure investment*," these commenters propose sweeping new regulations granting further governmental

rights of access to incumbents' networks — for example, new unbundling rules,[1] an unprecedented extension of *Computer III*, ONA, and equal-access requirements,[2] and even a *re*regulation of inside wiring[3] — that would only discourage incumbents from risking their capital. Moreover, although these commenters correctly note that Congress defined "advanced telecommunications capability" in technology- and competitor-neutral terms, they still hope to have the Commission pick market winners and losers (and include themselves among the winners); they selectively bootstrap their own technologies into the definition of "advanced telecommunications capability" while attempting to deny their competitors the deregulatory flexibility that Congress intended. And whereas the Commission properly recognized in the Notice of Inquiry that the development of a single market for broadband could collapse traditional regulatory categories and possibly even obviate the need for regulation,[4] these commenters propose utterly self-serving responses to convergence: either achieve regulatory parity by extending *maximal* regulation to *all* network providers, or blindly maintain obsolete

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[1] *See, e.g.*, Allegiance Telecom at 4-7, 17-19; Ass'n for Local Telecommunications Svcs. at 16-17; DSL Access Telecommunications Alliance at 16-17; Retail Internet Service Providers at 14-17.

[2] *See, e.g.*, ADC Telecommunications at 18; America Online at 11-13; Coalition of Utah Independent Internet Service Providers at 3-6; Retail Internet Service Providers at 11-12.

[3] *See, e.g.*, Allegiance Telecom at 8-11; Ass'n for Local Telecommunications Svcs. at 18-22; AT&T at 48-52; Teledesic at 6-10.

[4] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706*, CC Dkt. No. 98-146, ¶¶ 80-81 (rel. Aug. 7, 1998) ("*Notice of Inquiry*").

regulatory classifications in order to give some companies (those that have their roots in a lightly regulated sector) a permanent advantage over their competitors in this single market.

In this reply, U S WEST again discusses the solution that Congress intended and that many commenters do endorse: encouraging inter-sector competition and achieving regulatory parity by *de*regulating all providers of competitive data services and nonbottleneck network facilities. First, the evolving single market for broadband services makes the forward extension of sixty-year-old regulatory classifications untenable. Second, Commission regulations, most notably unbundling and discounted resale rules, diminish network providers' incentives to invest in infrastructure and deploy advanced capability; accordingly, the Commission should limit the application of these regulations to those few facilities and services for which no functional substitutes are available in the marketplace. Finally, the Commission should reject the ISPs' demand for new regulations of incumbent LECs. There are already extensive protections in place — the *Computer III* and ONA rules — that have well safeguarded the interests of enhanced service providers; and the ISPs' unsubstantiated and inflammatory accusations of discrimination obscure the fact that U S WEST has, voluntarily and in good faith, gone well beyond its *Computer III* and ONA obligations to work with state public utility commissions and the ISP community to accommodate ISP concerns.

I. COMMENTERS CONFIRM THAT CONVERGENCE IS CREATING A SINGLE MARKET FOR BROADBAND SERVICES THAT ERODES LAST-MILE BOTTLENECKS AND IS SELF-POLICING.

As the Commission hoped would happen, network providers from many different sectors of the communications industry have participated in this proceeding. Incumbent LECs,

CLECs, satellite providers, cable providers, fiber wholesalers, and different types of mobile and fixed wireless carriers, for example, filed comments describing their plans to deploy advanced data infrastructure and services. Even though these commenters employ very different transmission technologies (and offer competing "last miles" to their end users), there is a remarkable overlap in the services they provide and the customers they are targeting; their comments demonstrate that, in a digital world with standard routing and compression protocols, *any* network provider able to move bits sufficiently quickly can offer end users a full complement of voice, video, and high-speed data services.[5/] These commenters agree that Congress anticipated such convergence by defining advanced telecommunications capability "without regard to any transmission media or technology." Act § 706(c).[6/]

These parties also confirm that convergence is driving the evolution of a single broadband market, and that network providers from historically different segments of the communications industry now perceive one another as direct competitors. Commenters describe a market in which the incumbents in formerly discrete services are now new entrants in all others: LECs who are incumbent telephone service providers are using xDSL technologies to become new entrants in the multichannel video market, for example, while cable incumbents are

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5/ *See, e.g.*, American Public Power Ass'n at Attachment A; AT&T at 9-16, 20-22; Bell Atlantic at Attachment A; BellSouth at 13-31; CTIA at 2-8; PCIA at 8-16; Qwest at 9-16; Skybridge at 7-9; Teligent at 1-6.

6/ *See, e.g.*, ADC Telecommunications at 5-7; AT&T at 3-5; Cincinnati Bell at 7; Commercial Internet eXchange at 8; Nat'l Cable Television Ass'n at 19.

moving in the reverse direction.[7] The comments also portray a market in which facilities-based, intermodal competition — *not* the heavy hand of the regulator — is both a powerful spur to innovation and a strong protector of consumers' interests.[8] Many commenters cite the example of competition between cable modem and xDSL service providers, and although the commenters disagree about who was the market innovator and who followed,[9] nobody disputes that each provider now must take account of what its competitor is doing when setting prices and offering services, even though the two firms supposedly operate in different (and differently regulated) sectors of the industry. Such a market structure creates choice in the last-mile bottleneck and

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7/ *See, e.g.*, AT&T at 14; BellSouth at 13-17; U S WEST at 9 and n.12.

8/ *See, e.g.*, American Public Power Ass'n at 6-7; Ameritech at 6-7; BellSouth at 33-36, 47-49; Cincinnati Bell at 16-19, GTE at 34-35; Nat'l Cable Television Ass'n at 24-25; Progress & Freedom Foundation at 55-56; Technology Entrepreneurs Coalition at 4-6.

9/ For example, in an attempt to deny that incumbent LECs have the ability or incentive to invest in new technologies (and thereby to downplay the harm caused by regulatory barriers to LEC innovation and investment), several CLECs and cable MSOs claim that incumbent LECs have deployed xDSL only in markets where cable modems and CLEC xDSL services are available. *See, e.g.*, AT&T at 10; DSL Access Telecommunications Alliance at 8-9; Information Technology Ass'n of America at 7. This is incorrect. When U S WEST announced its 14-state, 43-city rollout of MegaBit services, cable modem services were offered in only 3 of those markets, and CLECs had yet to offer xDSL in any of them. Moreover, this claim would be meaningless even if true: A market-driven competitive response by an incumbent LEC to facilities-based entry is something to encourage, not criticize.

More fundamentally, the suggestion that incumbent LECs bring nothing to the advanced services marketplace and can be safely benched is dangerous to consumer welfare and directly contrary to the command of Section 706. *See, e.g.*, Separate Statement of Commissioner Michael K. Powell at 1, attached to Mem. Op. and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. No. 98-147 *et al.* (rel. Aug. 7, 1998) ("*Advanced Services Oraer*") ("Simply put, we cannot relegate BOCs or other big companies to the sidelines in the data services 'race' unless we are prepared to deny the economy and consumers of the benefits of these companies' expertise and capital.").

prevents any one network provider from disadvantaging end users or downstream providers such as ISPs.

Commenters also agree with U S WEST that the Commission's failure thus far to adjust its policies to the realities of convergence has discouraged, and will continue to discourage, the development of intermodal competition. By flatly decreeing that every time an incumbent LEC uses a certain kind of *technology* (packet switching) it necessarily provides a *service* (telephone exchange service or exchange access) subject to section 251(c) unbundling and discounted resale,[10/] the Commission has permanently disadvantaged incumbent LECs relative to every other firm in the advanced services marketplace, even though all may provide identical or substitute services.[11/] The single-minded focus on helping firms compete with the incumbent LECs through inputs provided by the incumbents themselves discourages those LECs from deploying the technology needed to compete with anybody else — including the incumbent cable providers, who possess more control over their networks than telephone companies do but without any of the unbundling or nondiscrimination safeguards. These policies deprive consumers of incumbent LEC-provided services and force them to pay higher prices for services provided by the companies the Commission has insulated from incumbent-LEC competition.

Competitors who benefit from this artificial regulatory leg-up argue that the Commission is powerless to correct the disparity. They argue, correctly, that Section 706 is a

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10/ *Advanced Services Order* ¶¶ 42-44. In doing this, the Commission never articulated actual definitions of "telephone exchange service" or "exchange access services"; rather, it simply said that it saw no reason to exclude packet-switched services from their reach. *Id.* ¶ 42.

11/ *See, e.g.*, BellSouth at 36-38, 42-44; GTE at 14-16; GVNW at 6.

deregulatory provision that requires the Commission to *lift* regulatory barriers to infrastructure investment and cannot be read to give the Commission authority to extend incumbent-carrier Title II regulation to new providers or services.[12] But U S WEST is not proposing to achieve parity by shackling everyone to the same innovation-frustrating regulations to which it is subject. Rather, U S WEST and other commenters are asking the Commission to cabin incumbent regulation to those particular services and network facilities where providers are in fact incumbents with market power or bottleneck control.[13] When those providers are instead new entrants in the multi-provider market for broadband — an arena, the Commission has recognized, in which the incumbent LEC "does not currently enjoy the overwhelming market power that it possesses in the circuit-switched voice telephony market"[14] — the rationale (and congressional authorization) for incumbent carrier regulation disappears. The Commission should reject the self-serving suggestion of the current recipients of regulatory largesse that incumbent LECs must be fenced off from contributing to the advanced services market on an equal basis.[15]

12/ *See, e.g.*, Comcast at 7-8; Nat'l Cable Television Ass'n at 20-21, 26; Time Warner at 8-9.

13/ *See, e.g.*, BellSouth at 4-6, 36-38; Progress & Freedom Foundation at 56-57.

14/ *Advanced Services Order* ¶ 10.

15/ AT&T, for instance, goes so far as to say Congress intended that only *competitors* of incumbent LECs would be regulated in ways that "seek to encourage them to unproven new technologies." AT&T at 37. This is nonsense. The 1996 Act takes many steps to encourage incumbent LECs to enter new markets and make innovative uses of their telephone plant. For example, the Act added a new part to Title VI authorizing common carriers to use their telephone networks to provide multichannel video services in competition with incumbent cable monopolies free from Title II. *See* 47 U.S.C. §§ 522(7)(C), 571(b). Congress clearly did not view incumbent LECs as the one group of companies whose innovations and investments were not welcome in the marketplace, and the Act would permit no such discrimination.

II. THE COMMENTS OF MOST FACILITIES-BASED PROVIDERS CONFIRM THAT UNBUNDLING, DISCOUNTED RESALE, AND PRICE AND PRODUCTIVITY REGULATIONS DISCOURAGE INVESTMENT IN ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE.

The commenters largely agree on what gives *any* network provider the incentive to invest in new infrastructure and develop innovative new services: the ability to differentiate oneself from one's competitors and profit from one's investments.[16] In Section 706, Congress recognized that regulation can blunt that incentive by reducing the rewards of risk-taking, preventing carriers from differentiating themselves from their competitors, and introducing delays and uncertainties into the deployment of new services. Accordingly, Congress directed the Commission to exercise "regulatory forbearance" and "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment" that the Commission identifies in this inquiry. Act §§ 706(a), (b).

As Chairman Kennard properly recognized at the beginning of these deliberations, unbundling, discounted resale, and price and productivity regulations discourage incumbent LECs from investing in advanced infrastructure, to the ultimate detriment of the public:

> To provide the advanced services, telephone companies will have to invest in advanced electronics. But the telephone companies have rightly asked, why should we make this new investment if we simply have to turn around and sell this new service — or the capabilities of

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16/ As even MCI recognizes, "[c]ompetition in the marketplace will lead to more rapid innovation because carriers will have the natural incentive to distinguish themselves from competing carriers by bringing new services to the market. In the end, this incentive will accelerate technology development, foster competition and reduce costs for customers." MCI and WorldCom at 13. *See also, e.g.*, Bell Atlantic at 14; Ameritech at 13-14; Cincinnati Bell at 13-15; PCIA at 16-17; Technology Entrepreneurs Coalition at 4-6.

> these electronics — to our competitors? If the telephone company has opened up its underlying networks to competition, the competitors can invest in the same advanced services.
>
> Where networks are open, I see no reason to require discount resale or unbundling of these new services and advanced technologies that are available to all.[17]

Not surprisingly, the comments filed by incumbent telephone companies confirm the Chairman's assessment that these rules diminish their incentives to take risks and invest in the facilities needed to deploy advanced services to all Americans.[18] The comments of organizations representing members of the public with an interest in ensuring the widest possible deployment of advanced services likewise agree.[19]

Equally or even more important, cable operators, facilities-based CLECs, and other network providers *also* agree that these network-access and other regulations discourage providers from investing and innovating. Now that ISPs are asking the Commission to impose forms of unbundling and open-network regulation on these alternative networks, these providers apprehend the costs of the restrictions that they have previously advocated placing on incumbent LECs. AT&T now argues that "imposing incumbent-style obligations on new entrants would inhibit those companies' ability and incentive to invest in building the very facilities that the

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17/ Chairman William E. Kennard, "A Broad(band) Vision for America" at 5 (June 24, 1998).

18/ *See, e.g.*, Ameritech at 15; Bell Atlantic at 9-11; BellSouth at 54-55; GTE at 14-16.

19/ *See, e.g.*, Alliance for Public Technology at 4-5; Campaign for Telecommunications Access at 9-11; United Homeowners Ass'n at 9-10; Progress & Freedom Foundation at 48-49.

1996 Act seeks to promote."[20] Similarly, Comcast describes how extending any form of the incumbents' regulatory burdens to CLECs, cable companies, broadcasters, and ISPs would discourage them from deploying advanced telecommunications capability:

> Each of these groups of firms will divert resources away from offering services competitive with "telecommunications" if the result of providing such nascent competition is — or even might be — oppressive regulatory obligations such as rate regulation, unbundling, mandatory service to all potential customers on demand, or collocation. To the contrary, these firms will have every incentive to avoid deploying their potentially useful resources as "advanced telecommunications capability" . . . if the regulatory consequences of crossing the line into "telecommunications" are vague, potentially onerous, or both.[21]

The National Cable Television Association is the most blunt of all: "'Regulatory intervention' that leads to new burdens on competitive providers of advanced networks would turn section 706 on its head by suppressing investment in advanced infrastructure. *Section 706 does not empower the Commission to commandeer advanced infrastructure for the benefit of entities that choose not to take the risks of building their own facilities.*"[22] U S WEST wholeheartedly agrees with these assessments, which are echoed by others.[23]

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[20] AT&T at 40.

[21] Comcast at 17.

[22] Nat'l Cable Television Ass'n at iii (emphasis added).

[23] *See, e.g.*, ADC Telecommunications at 17-18; Cablevision at 6; Technology Entrepreneurs Coalition at 15-19.

To be sure, each of these companies proffers some unpersuasive justification for continuing to hold its significant potential competitors, the incumbent LECs, to the full complement of regulations it seeks to avoid.[24/] But that cannot change the basic point: A broad range of network providers agrees that unbundling, discounted resale, and price and productivity regulations do impose real costs on providers that discourage them from taking the risks inherent in developing new services and from investing in the infrastructure needed to deploy these services to all Americans. In light of those costs — which ultimately are borne by the consumers who are denied beneficial services — the Commission should use such regulatory tools only where truly necessary. Unbundling and discounted resale obligations are appropriate only for the narrow class of essential facilities and services that currently are unavailable to competitors from any source, including sources other than the incumbent provider, and for which there are no comparable functional substitutes. Where competitors are able to obtain needed inputs from other sources (including providers in other industry segments using different network

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24/ AT&T argues that unbundling and resale should not apply to CLECs, cable operators, and wireless providers "because their facilities are not essential facilities for new entrants, and these firms do not possess market power over telecommunications." AT&T at 39. But as explained in the text, the facilities that U S WEST asks the Commission to refrain from regulating are competitively available and thus not "essential." U S WEST has always agreed that the rules should apply to facilities such as loops while they are bottlenecks, but not beyond that. Like AT&T, Comcast and NCTA also generically cite "market power" as a reason to continue heavy regulation of incumbent LECs. Comcast at 19 and n.32; Nat'l Cable Television Ass'n at 25. As the Commission recognized in its *Advanced Services Order*, however, an incumbent LEC's power in the circuit-switched voice market does not translate into power in the advanced services market, where it starts with the same zero market share as everyone else. *See Advanced Services Order* ¶ 10; *see also* Chairman William E. Kennard, "A Broad(band) Vision for America" at 5 (June 24, 1998) ("All companies are new entrants when it comes to these services."). Incumbent LECs' power in the circuit-switched market is no more or less relevant to the advanced-services market than incumbent cable operators' power in the MVPD market.

technologies), the limited incremental benefits of imposing strict network access duties on the incumbent are far outweighed by the costs of depressing the incumbent's incentives (and the incentives of new entrants) to innovate and invest in advanced telecommunications capability.[25/]

Ultimately, there is a broad consensus in the comments as to what regulatory climate best "encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by multiple, competing facilities-based providers: a climate of *de*regulation that relies on market incentives to encourage carriers to innovate, invest in infrastructure, and set their entry strategies. The Commission should not attempt to guide the direction of technological development or examine individual sectors of the marketplace to decide whether there should be more or fewer competitors in particular market segments. Commenters cite the ISP, CMRS, and Internet backbone industries as examples of sectors that have thrived as a result of conscious decisions by the Commission to forbear from regulating them.[26/] Cable operators (and soon-to-be cable operators, such as AT&T) explain that relative deregulation enabled them to accelerate their investments in infrastructure and network

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25/ For example, as the Commission has acknowledged by proposing that incumbent LECs be permitted to avoid unbundling network electronics by putting them in a separate affiliate, competitors do not in fact *need* to obtain most of the facilities used to provide xDSL from the incumbent. The facilities are therefore not essential for new entrants, and requiring competitors to purchase them in the open market does not "impair" their ability to provide xDSL services. *See* 47 U.S.C. § 251(d)(2)(B). The Commission should therefore refrain from requiring incumbent LECs to unbundle these facilities *whether or not* the incumbent places them in a separate affiliate. *See* Comments of U S WEST Communications, Inc., *Advanced Services NPRM* at 5-8 (filed Sep. 25, 1998).

26/ *See, e.g.*, America Online, Inc. at 6 & n.10; AT&T at 40-42; Bellcore at 1-3.

upgrades,[27] and they ask the Commission to "isolate" cable-modem services from Title II regulation in order to "foster the development of competitive broadband and advanced communications."[28] There is no reason to think that incumbent LECs respond to regulatory incentives and disincentives differently than companies in these other segments, and Section 706 does not direct the Commission to encourage the deployment of advanced telecommunications capability *only* by parties other than incumbent LECs. Therefore, if the Commission hopes to make good on its "commit[ment]" to "ensur[e] that incumbent LECs make their decisions to invest in and deploy advanced telecommunications services based on the market and their business plans, rather than regulation,"[29] it must be prepared to limit its regulation of incumbent LECs, just as it has done for other segments of the marketplace.

III. THE ISPS OBSCURE THE FACT THAT THERE ARE EXTENSIVE SAFEGUARDS IN PLACE TO ENSURE THAT THEY ARE TREATED EVENHANDEDLY BY INCUMBENT LECS.

Several individual Internet service providers and coalitions of ISPs accuse the incumbent LECs of deploying advanced telecommunications capability in a way that favors their own enhanced services or enhanced-service affiliates, and they call on the Commission to adopt sweeping new regulations of the incumbents.[30] Some of these commenters make undocumented

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27/ *See, e.g.*, Nat'l Cable Television Ass'n at 2-4; Progress & Freedom Foundation at 40-42.

28/ AT&T at 39 (quoting Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series 30, at 86 (1998)).

29/ *Advanced Services Order* ¶ 13.

30/ *See* Retail Internet Service Providers ("Retail ISPs") at 10; Coalition of Utah (continued...)

(and unverified) allegations of discrimination by U S WEST, attach unadjudicated complaints from state public utility commission proceedings,[31] or recycle allegations from a complaint that a state commission specifically *declined* to pursue.[32] At the same time, at least one of these critics properly recognizes that the only reason that ISP complaints appear to center on U S WEST is that it is the company that has deployed xDSL services most widely.[33]

The new regulations that the ISPs propose are entirely unnecessary. U S WEST views the offering of xDSL services to independent ISPs as a business opportunity and treats it as such. Moreover, incumbent LECs such as U S WEST do not provide advanced services in a vacuum. Unlike cable operators, who are now entirely free to bundle Internet access with their

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30/ (...continued)
Independent Internet Service Providers ("Utah Coalition") at 4, 9; Commercial Internet eXchange Association at 17-18.

31/ The Retail ISPs attach a complaint filed with the Minnesota Public Utilities Commission by the Department of Public Service and Office of the Attorney General. The complaint has not yet been investigated, let alone adjudicated, and the Commission is in the middle of hearing arguments on a motion to dismiss it. Moreover, as explained *infra*, the bulk of the complaint concerns sales and provisioning practices that U S WEST adopted either to comply with the Commission's *Computer III* and ONA rules or to accommodate the specific concerns of ISPs and that the Washington and Oregon state public utility commissions approved.

32/ The Utah Coalition spends much of its comments rehashing allegations that were the subject of an informal complaint it made to the Utah Public Service Commission in May 1998. *See* Utah Coalition at 3-6. After a preliminary investigation, however, the Utah PSC decided there was no basis for pursuing the complaint. The Utah Coalition blames this decision on a state statute that gives LECs greater pricing and tariffing flexibility in deploying advanced new services, *id.* at 6, but the PSC has never suggested that the statute disables it from investigating or taking action against alleged discrimination in the marketplace.

33/ Retail ISPs at 9 n.12 ("The Retail ISPs have no reason to think that U S West's conduct regarding the deployment of xDSL and its relations with its ISP affiliate are any more or less abusive than would be the case with any other ILEC. U S West is simply farther along in its xDSL rollout than any of the other ILECs.").

cable modem services, U S WEST may provide information services only in accordance with the Commission's *Computer III* and ONA rules.[24] These rules are designed to ensure that BOCs give unaffiliated enhanced service providers (such as the ISP commenters) the same access to their basic telecommunications facilities and services that they provide to their own enhanced services or affiliates. For example, the rules require U S WEST to unbundle all of the basic service elements it uses to provide enhanced services; sell these elements to its affiliate (or impute their prices to its own enhanced services) from the same tariffs that unaffiliated providers use; and provision, install, and maintain these elements for their own enhanced services and independent ESPs on equivalent timetables. U S WEST must issue periodic reports to show that it is meeting these obligations and filling all providers' orders in an equally timely fashion. U S WEST must also give unaffiliated information service providers advance notice and technical documentation of all network changes, and may not use these new capabilities itself until after

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[24] *See Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Computer III*"), Report and Order, Phase I, 104 FCC 2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Recon. Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Phase I Further Recon. Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Recon.*"), *Phase I Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Phase II Recon. Order*"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase II Further Recon. Order*"), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

they have been disclosed and made available to unaffiliated providers.[35] Importantly, given the ISPs' complaints about U S WEST's methods of marketing its MegaBit xDSL and its Internet access offerings, the Commission's rules *permit* BOCs to jointly market their regulated telecommunications and unregulated information services as long as they observe proper cost allocation principles.[36]

As the attached description of U S WEST's practices demonstrates, U S WEST offers its xDSL and Internet services in strict compliance with the ONA and *Computer III* rules.[37] U S WEST's affiliated ISP, USWEST.net, takes MegaCentral (the connection that allows hosts to receive subscribers' xDSL traffic) on the same terms as it is available to unaffiliated ISPs. USWEST.net waits in the same line for facilities and services as unaffiliated ISPs, and its orders are filled no faster or slower than orders of comparable complexity from other ISPs. U S WEST conducted the necessary network disclosures before tariffing MegaBit services; indeed, it went beyond what Commission rules require by contacting independent ISPs and inviting them to information sessions to explain exactly how they could provide xDSL service to their subscribers. USWEST.net is not permitted to order MegaCentral until other ISPs can place their orders, although many ISPs waited until well after the starting date to submit their

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35/ *See also* 51 C.F.R. § 51.325-.335.

36/ *See Phase I Order* ¶¶ 96-97.

37/ As has been previously noted, U S WEST's Internet access service is offered in compliance with three separate CEI plans that are on file with the Commission for on-line database services, protocol conversion, and electronic messaging. These plans contain specific procedures and safeguards that implement the requirements of *Computer III*, many of which are listed in the text and in the attachment to these comments.

requests, which delayed the provisioning of their connections.[38] Unanticipated demand for xDSL services (combined with the failure of many ISPs to provide U S WEST with demand forecasts) resulted in some facilities shortages, but those shortages affected USWEST.net and unaffiliated ISPs equally.

U S WEST has also gone well beyond these *Computer III* and ONA safeguards to work with ISPs and state regulators to develop an ordering process that enables potential subscribers to connect to whatever xDSL-capable ISP they choose and does not steer them to any particular ISP. As detailed in the attachment to this reply, U S WEST gives unaffiliated ISPs several ways for their subscribers to order xDSL service without ever going through a U S WEST representative or even hearing about USWEST.net; ISPs can place orders for their subscribers by submitting electronic letters of authorization to U S WEST, for example, or give potential subscribers a "safe harbor" toll-free number to call where USWEST.net is never mentioned. Even if a potential customer does call the U S WEST sales channel, he can be transferred to the "safe harbor" at any time. U S WEST designed these and other safeguards at the request of several ISPs and with the approval of the Oregon and Washington public utility commissions. U S WEST continues to monitor the sales and ordering processes and will modify them as necessary.

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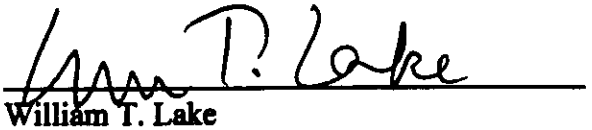
[38] Although several state public utility commissions did postpone U S WEST's offering of its retail subscriber xDSL services to enable some of these unaffiliated ISPs to catch up, *cf.* MCI and WorldCom at 29, this does not change the fact that the ISPs' delays in receiving MegaCentral connections were due to their failure to order service in a timely fashion, combined with the routine vagaries inherent in any facilities installation.

This is not to say that U S WEST's rollout of MegaBit services and its efforts to coordinate with unaffiliated ISPs have been entirely free from glitches; as with any new service (and especially with one deployed so quickly and on such a broad scale), there were a few missteps at the start, described both in the ISP comments and in the attachment to this reply. But U S WEST has made a good-faith effort to work with unaffiliated ISPs and state regulators to correct course as necessary, and the safeguards described in the previous paragraphs are intended to ensure that the early mistakes are not repeated. Moreover, the benefits to consumers of having xDSL services available on a wide scale and on a greatly accelerated basis far outweighs the minimal harm that any missteps caused. Importantly, the parties have been able to work these issues out within the context of *existing* enhanced service rules; there is no need to layer yet another set of regulations on these services. It would of course be manifestly inappropriate to do

so as a result of this proceeding, where the Commission is supposed to be looking at ways to *lift* regulatory barriers to investment.

Respectfully submitted,



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October 8, 1998

Attachment to U S WEST Communications, Inc.'s Reply Comments

REGULATORY AND VOLUNTARY SAFEGUARDS APPLICABLE TO U S WEST'S ADVANCED NETWORKING SERVICES

U S WEST offers data services and products subject to a variety of regulatory and self-imposed safeguards that fully protect the interests of unaffiliated Internet service providers. Some ISPs have nevertheless expressed concerns in their comments on the Commission's Notice of Inquiry that the BOCs' — and, in particular, market leader U S WEST's — provision of information services threatens to curtail unaffiliated ISPs' opportunities to compete. U S WEST has carefully considered such concerns in designing and deploying its advanced data services; ISPs are not simply competitors of the USWEST.net ISP service, but valued customers of U S WEST's MegaBit service. U S WEST accordingly has gone to great lengths to ensure that all ISPs have unfettered access to customers of U S WEST's advanced telecommunications services.

U S WEST's voluntary safeguards are an overlay on the Commission's *Computer* rules, which on their own prevent discriminatory interconnection arrangements and cross-subsidization of unregulated activities by regulated ones. To supplement these mandatory protections, U S WEST has, among other things, (1) met with unaffiliated ISPs at an early juncture in each state in which it has deployed advanced services to make them aware of ordering and provisioning requirements; (2) taken prompt action wherever possible to alleviate the effects of provisioning delays; (3) created a "safe harbor" in its sales channel so that sales consultants will not pitch USWEST.net to customers who are not interested in the service; and (4) gone so far as to establish, at significant expense, joint marketing procedures that allow independent ISPs to cut U S WEST out of the sales process entirely, should they wish to serve as a customer's only point of contact.

I. Structure of the U S WEST !nterprise Networking Organization

U S WEST !nterprise Networking ("!nterprise") is a product-development and service-support organization for data products and services offered by U S WEST !nterprise America, Inc. ("!nterprise America") and U S WEST Communications, inc. This organization includes both regulated and unregulated products and services. !nterprise's MegaBit offering illustrates how a service may include both regulated and unregulated components. The transport and switching associated with MegaBit are regulated and fall under the aegis of U S WEST Communications, Inc. At the same time, the CPE associated with MegaBit — the DSL-capable modem and, where needed, network interface card — are unregulated and are provided by !nterprise America, U S WEST's entity that concentrates on unregulated products and services within U S WEST's 14-state region and on out-of-region data service initiatives.

!nterprise America also offers USWEST.net, an unregulated service that provides Internet access (with or without the MegaBit service). USWEST.net purchases facilities and services, such as transport facilities and billing and collection services, from U S WEST Communications, Inc. pursuant to published tariffs. Like other ISPs, USWEST.net cannot order any tariffed product or service until the effective date of the tariff.

To the extent that personnel employed by a regulated entity within U S WEST's corporate structure perform any functions relating to unregulated services, their time and expenses are accounted for in accordance with nonstructural separation safeguards imposed by the Commission and the states.

II. The Commission's *Computer* Rules

The Commission has developed a detailed set of rules — collectively known as the *Computer* rules — that govern U S WEST's joint provision of basic common carrier services and enhanced services (such as Internet access).[1] At bottom, the *Computer* rules prohibit U S WEST from exploiting an integrated operation to the detriment of competitors who must rely on U S WEST's basic transmission services in order to serve their own customers. The Commission has identified two principal types of anticompetitive conduct: discriminatory interconnection and cross-subsidization. Notably, U S WEST *may* achieve business efficiencies through joint marketing, one-stop shopping, joint research and product development, and joint realization of overall service efficiencies without unfairly disadvantaging competitors; indeed, depriving U S WEST of such benefits would unjustifiably harm the company and its customers.[2] Thus, comments asserting that U S WEST has acted inappropriately by creating a "clear and unmistakable link between DSL and

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[1] *See Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Computer III*"), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Recon. Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Phase I Further Recon. Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Recon.*"), *Phase I Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II, 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Phase II Recon. Order*"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase II Further Recon. Order*"), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), *cert. denied*, 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding).

[2] *See* Phase I Order, 104 FCC2d 958, at ¶¶ 96-97.

USWEST.net" through its marketing campaign are entirely unfounded; U S WEST is expressly permitted to establish such a link.[3/]

The Commission initially adopted a two-phase system of nonstructural safeguards designed to permit BOCs to provide basic and enhanced services on an integrated basis.[4/] Phase one required the BOCs to obtain Commission approval of a service-specific comparably efficient interconnection ("CEI") plan in order to offer a new enhanced service.[5/] In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used to provide their own enhanced service offerings, subject to a series of "equal access" parameters.[6/] Phase two required the BOCs to develop and implement open network architecture ("ONA") plans.[7/] ONA plans explained how a BOC would unbundle and make available to unaffiliated ESPs network services in addition to those the BOC used to provide its own enhanced services; the plans were required to meet a defined set of criteria in order to release a BOC from a previously applicable structural separation requirement.[8/]

3/ Coalition of Utah Independent Internet Service Providers ("Utah Coalition") at 4.

4/ *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 ¶ 10 (1998) ("*1998 Biennial Review*").

5/ *Id.*

6/ *Id.*

7/ *Id.* ¶ 11.

8/ *Id.*

Following a series of appeals and the passage of the Telecommunications Act of 1996, the *Computer III*/ONA rules are in a state of flux.[9] But key nonstructural safeguards intended to prevent discrimination and cost misallocation remain in effect.[10]

The Commission's rules that prevent discriminatory interconnection include the following:

- Network Disclosure. These rules prevent U S WEST's information services affiliate from gaining an unfair competitive advantage by virtue of advance knowledge of changes in U S WEST's basic telecommunications network.[11] Before offering any new network interface, U S WEST must disclose to the industry the new interface (including deployment information).[12] Competitors have certain testing rights and the right to participate in some technical trials.[13]

- Equal Provisioning. U S WEST may not discriminate against competing providers of information services in the actual provisioning of basic telecommunications services.[14] Provisioning equality applies to timing of service delivery and repair as well as to service quality.[15] U S WEST files

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9/ *See, e.g., id.* ¶ 7.

10/ *See generally 1998 Biennial Review.*

11/ *See 1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 117, 122; *Local Competition Second R&O*, 11 FCC Rcd 19392, at ¶¶ 171-173.

12/ *Id.*

13/ *See BOC Joint Petition*, 10 FCC Rcd 13578, at ¶ 42; *Phase I Order*, 104 FCC2d at 1041.

14/ *See* 47 U.S.C. § 202(a); *1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 43-48; *Phase I Order*, 104 FCC2d at 1036 ("[W]e require the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services.").

15/ *See 1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 112-113; *BOC Joint Petition*, 10 FCC Rcd 13578, at ¶¶ 37-42; *Phase I Order*, 104 FCC2d at 1039-41.

reports with the Commission on a regular basis comparing its service intervals to its own enhanced services with service provided to competitors.[16]

- Collocation. The network connections U S WEST offers its own enhanced services via collocated space must be comparable to connections available to competitors; moreover, if connections are priced on a distance-sensitive basis, U S WEST's enhanced service offering must include an imputed charge for interconnection based on the rate that would apply if the collocated space were two miles from the central office.[17]

To foreclose the opportunity for cross-subsidization of a competitive enhanced service offering by basic telecommunications services, the Commission has adopted comprehensive cost allocation rules. These rules attribute to unregulated accounts both the direct costs of provisioning the enhanced service and a portion of all joint and common costs for facilities and activities supporting both regulated and unregulated activities.[18] U S WEST's particular cost allocation procedures are set forth in detail in its Cost Allocation Manual, on file with the Commission. U S WEST's cost allocation is also subject to annual audit by the Commission or an outside auditor.[19]

Whenever a U S WEST enhanced service uses a U S WEST service that is offered at tariff, the enhanced service must incorporate the tariffed price into its own service

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16 *See Bell Atlantic Telephone Companies' Offer of Comparably Efficient Interconnection to Intranet Management Service Providers*, 1998 WL 514173, DA 98-1655, at ¶ 27 (CCB 1998) ("*Bell Atlantic CEI Plan*"); *1998 Biennial Review* ¶¶ 112-113; *Phase II Order*, 2 FCC 2d 3072, at ¶ 100.

17 *See Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, at ¶¶ 168 (1988).

18 *See* 47 C.F.R. §§ 64.901-903.

19 *See id.* § 64.904(a).

rates.[20] When U S WEST transfers assets or services between its regulated common carrier operation and any corporate affiliate, similar accounting rules apply.[21] Assets must be transferred from the regulated entity to the affiliate at the higher of net book cost or market value, and from an affiliate to the regulated entity at the lower of these two amounts.[22] Services are accounted for based on cost allocation principles that are comparable to those that govern integrated operations.[23]

III. Additional Safeguards Relating to Provisioning and Sales of MegaCentral and MegaSubscriber

In addition to these safeguards imposed by the Commission, U S WEST subjects the MegaBit service to additional safeguards to ensure fair treatment of unaffiliated ISPs and to enable them to obtain facilities from other carriers. MegaBit comprises two components: End users may purchase MegaSubscriber, which provides xDSL connectivity from the end user's premises to the serving central office, and ISPs seeking to serve such end users must obtain a MegaCentral connection, which supplies them with ATM functionality and DS-1 or DS-3 connections from the ATM switch to their premises (the bandwidth choice depending on anticipated volume). MegaCentral and MegaSubscriber are provisioned and marketed according to detailed methods and procedures. Parts A and B below summarize these safeguards for MegaCentral and MegaSubscriber, and Part C reviews the measures U S

20/ *See id.* § 64.901(b)(1).

21/ *See id.* § 32.37.

22/ *See id.* § 32.37(b).

23/ *See id.* § 32.27(c).

WEST has taken to allow ISPs to serve MegaSubscriber customers even if they use other carriers' transport facilities.

A. MegaCentral Provisioning Safeguards

All MegaCentral orders, whether placed by an independent ISP or USWEST.net, are handled uniformly.[24/] Upon receipt of an order, the external sales channel prepares an executive summary and forwards it to the MegaBit Product Manager (for DS-1 orders) or the ATM Product Manager (for DS-3 and above orders) for approval. If the order is approved, the sales channel contacts the contract development group with instructions to prepare a contract for delivery to the customer. Once the fully executed contract is provided to U S WEST, the order form is completed and sent to !nterprise for order issuance and project tracking by either an account consultant or project leader within the !nterprise organization. Within one or two days after !nterprise receives a MegaCentral order, a notice of that order is posted on a special web site that may be accessed by unaffiliated ISPs.

In general, orders for MegaCentral connections are filled on a first-come, first-served basis. Inevitably, however, some orders take longer than others to fill, no matter when U S WEST personnel *initiate* the provisioning process. For example, a MegaCentral order that does not require any construction or addition of power in a central office will be provisioned more quickly than one that does necessitate either of those steps. The provisioning of DS-1 and DS-3 links also entail different methods and procedures that take different amounts of time to complete. Because DS-3 connections generally are fiber-based,

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24/ Comments implying that U S WEST processes its own ISP's orders before processing unaffiliated ISPs' orders are simply incorrect. *See, e.g.*, Retail Internet Service Providers ("Retail ISPs") at 10 & Attached Complaint of Minnesota Department of Public Service ¶¶ 17-26.

and DS-1 connections are copper-based, DS-3 links typically entail more time-consuming construction.

Accordingly, commenters who assert that U S WEST routinely installs USWEST.net's MegaCentral facilities sooner than it fills unaffiliated ISPs' orders overlook salient facts.[25/] Because the time it takes for !nterprise to provision MegaCentral services is a function of a variety of factors, the company cannot guarantee that every ISP will receive a MegaCentral connection within a specified time frame. Provisioning disparities typically result from differing construction requirements, not discrimination.

Indeed, !nterprise has gone to great lengths to work with unaffiliated ISPs to make them aware of provisioning requirements. ISPs are valued customers and potential customers of MegaCentral, and !nterprise is careful to consider their needs. Accordingly, U S WEST personnel met with ISPs in advance of filing a MegaBit tariff in each state in which !nterprise has introduced MegaBit services. The purpose of these meetings was to acquaint the ISPs with the features of the new services and to make certain that ISPs fully understood what they needed to do in advance of the rollout in order to serve as a MegaSubscriber customer's ISP. In addition to explaining MegaBit services to ISPs, U S WEST requested forecasts of demand from the ISPs so that such information could be factored into the deployment schedule for DSLAMs in the serving central offices.

With respect to DS-3 links in particular, U S WEST explained in these meetings that ISPs planning to order DS-3 MegaCentral connections needed to get their orders in as quickly as possible to leave sufficient time for necessary construction.

25/ *See* Retail ISPs at Attached Complaint ¶¶ 23-26; Utah Coalition at 3-4.

Moreover, to help ISPs overcome delays associated with DS-3 orders, U S WEST has permitted ISPs to order DS-3 access links before the MegaCentral tariff became effective, has offered in several instances to provide service over DS-1 facilities while the ISP awaits installation of the DS-3 link, and even has supplied (on an interim basis) the necessary terminating equipment at no charge.

Notwithstanding U S WEST's efforts to encourage ISPs to order MegaCentral connections far enough in advance for them to serve MegaSubscriber customers as soon as the service became available, many ISPs have failed to submit orders in time for that to occur. This failure has produced variances in dates of deployment of MegaCentral to USWEST.net and to some unaffiliated ISPs — variances that, as noted above, these ISPs (and a few state commissions) have interpreted as evidence of preferential treatment.[26/] In fact, such variances often have been caused by ISPs' own inaction.

There undoubtedly have been some isolated glitches — as occurs with the rollout of any new service — for which ISPs were not responsible. In general, problems have resulted from the large demand for high-speed services such as MegaBit, which in turn has caused facilities shortages. Critically, such shortages have affected USWEST.net as well. In Seattle, for example, USWEST.net waited in line for a MegaCentral connection alongside unaffiliated ISPs; and it was one of those unaffiliated ISPs — not USWEST.net — that was first to have its service activated.

Some other problems have been harder to predict. U S WEST encountered not only demand-induced shortages but also quality problems with the DSLAMs it has

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26/ *See* Retail ISPs at 10 & Attached Complaint ¶¶ 23-26; Utah Coalition at 3-4.

purchased. U S WEST demanded a swift response by the manufacturer, and the problems were resolved in short order. U S WEST now closely monitors DSLAM capacity in each serving central office and provisions additional equipment once 25 percent of the ports are utilized. Moreover, because some Utah customers were unable to sign up for service when DSLAM capacity became temporarily exhausted, and therefore missed out on U S WEST's offer of a free modem (regardless of the subscriber's choice of ISP), U S WEST agreed to honor the offer after its expiration date to make sure that no unaffiliated ISP would shoulder any blame for the delays. Far from acting anticompetitively,[27] or "shamelessly discriminat[ing],"[28] U S WEST has been uncommonly solicitous to unaffiliated ISPs.

In sum, while the rollout of MegaCentral has not been flawless, U S WEST has done everything possible to accommodate unaffiliated ISPs' interests. U S WEST has given ISPs clear notice that provisioning takes time and must be planned accordingly. Where problems such as facilities shortages have occurred, U S WEST has taken prompt action to ensure equal and fair treatment of all ISPs, and it remains committed to addressing any future problems quickly and cooperatively. U S WEST also voluntarily conducts parity analyses regarding the provisioning of facilities to unaffiliated ISPs and to USWEST.net and files quarterly reports on the results with the Commission. If any report indicates a statistically significant variance in favor of USWEST.net, U S WEST will conduct an investigation and take appropriate steps to correct the situation.

27/ *See* Utah Coalition at 3-4.

28/ Retail ISPs at 10.

B. MegaSubscriber Marketing and Provisioning Safeguards

1. Marketing

U S WEST also has voluntarily undertaken measures to give ISPs unfettered access to MegaSubscriber customers, and even has taken itself out of the sales loop where an ISP seeks to serve as a customer's single point of contact. The fact that the Minnesota Department of Public Service has filed a complaint concerning U S WEST's sales practices reflects its unfamiliarity with the lengths to which U S WEST has gone to ensure fairness;[29/] ironically, several of the practices about which Minnesota complains were adopted at the behest of another state commission.

To assuage concerns of independent ISPs and state regulators that USWEST.net is unfairly advantaged by its affiliation with !nterprise, U S WEST has undertaken or negotiated to undertake the following safeguards, at significant expense, which far exceed any legal requirement:

- U S WEST has hired an outside sales vendor to handle orders for MegaSubscriber services. U S WEST requires that sales consultants complete comprehensive training regarding all of its policies and procedures, including its Code of Conduct and Business Ethics policies. All sales consultants must be retrained at least annually.

- Sales consultants in all channels also receive regular updates as soon as procedures change. At least two of these updates about MegaBit have reminded consultants of their obligation to honor customers' choice of an ISP.

- The sales channel uses a voice response unit ("VRU") that gives callers dialing the toll-free "888-MEGAUSW" number the option to select either USWEST.net or any MegaCentral-equipped ISP. The VRU directs callers to select "1" for service with USWEST.net or "2" for service with any other ISP.

29/ *See* Retail ISPs at Attached Complaint ¶¶ 27-37.

- Any caller that selects option 2 (an ISP other than USWEST.net) is immediately directed to a sales consultant in a separate "safe harbor" group that is under strict orders to make no further attempt to market USWEST.net. Rather, sales consultants follow carefully prescribed steps to preserve neutrality. They first ask the caller to designate an ISP. If the ISP of choice is unavailable, the consultant offers to read a list of ISPs that do support MegaBit services. The Methods and Procedures given to sales consultants states: "If your potential customer already has an ISP or indicates they will be using another ISP and that ISP is a MegaCentral host, you must connect that customer to their existing ISP. It is imperative that the customer is advised of all ISPs listed . . . ." Consultants are also instructed to remind customers: "We want to assure you that U S WEST will provide the same high-quality service, installation, and maintenance regardless of where you purchase your Internet service."[30/] These scripts have been reviewed by state commissions and altered in light of their concerns.

- U S WEST has offered to establish and pay for a separate toll-free number that bypasses the VRU and routes callers directly to the "safe harbor" sales group.[31/]

- U S WEST directly monitors compliance with the safe harbor mechanism. U S WEST employees have dialed into the VRU to ascertain whether safe harbor consultants market USWEST.net; no such screening exercise has yet to uncover any misconduct. U S WEST also takes ISP complaints very seriously: When a Utah ISP reported an instance of inappropriate sales behavior concerning the "safe harbor," U S WEST investigated the matter and later terminated the sales consultant in question.

In addition to these safeguards, U S WEST has been working with unaffiliated ISPs in several states to develop a joint marketing program. This program was launched in

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30/ The existence of this safe harbor, combined with U S WEST's joint marketing rights, makes the propriety of the VRU unassailable. The Minnesota DPS nevertheless has alleged that "[t]his type of recording gives an unfair advantage to USWEST.NET service over competitive ISPs. . . ." Retail ISPs at Attached Complaint ¶ 28. *See also* Utah Coalition at 4 (wrongly contending that U S WEST's toll-free ordering system is anticompetitive).

31/ The Minnesota DPS has charged that a two-number system, no less than a single number with two options, is discriminatory. *See* Retail ISPs at Attached Complaint ¶¶ 36-37. But the fact that U S WEST is willing to provide this independent sales channel for unaffiliated ISPs — and pay for it — negates any charge that its sales practices are anticompetitive.

Minnesota in September 1998 and will soon be duplicated in other jurisdictions. This joint effort includes the following key features:

- U S WEST has been working to assist ISPs in determining whether there is a sound business basis for purchasing MegaCentral services; to this end, U S WEST has performed batch loop qualifications and promulgated guidelines for sizing MegaCentral connections.

- In addition to the separate toll-free number described above, U S WEST will implement an online web ordering tool ("MegaWOT"), which enables ISPs and customers to perform loop qualification and order services on line, thereby completely avoiding the necessity of talking with a U S WEST sales consultant.

- ISPs also may cut U S WEST sales consultants out of the MegaSubscriber sales process by obtaining a letter of authorization from the customer and placing the MegaSubscriber order on the customer's behalf. Letters of authorization are now available in electronic form for ISPs' convenience.

- U S WEST has designed and installed, at its own expense, a dedicated MegaCentral web page with hot links directly to ISPs' home pages. U S WEST also has agreed to encourage customers through advertisements to link to ISPs' home pages.

- U S WEST has adopted a series of financial incentives for all ISPs — except USWEST.net — to sign up MegaSubscriber customers.

- U S WEST MegaBit promotions, including free modems, are offered to MegaSubscriber customers regardless of whether they select USWEST.net or another ISP.

- U S WEST also provides technical assistance to ISPs, including discounted training.

Both the sales channel safeguards and the joint marketing program have been tailored to meet the specific concerns articulated by state commissions and ISPs.[32/] These

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32/ As noted above, U S WEST's willingness to pay for the promotion of competing ISPs' services undermines the Retail ISPs' and Utah Coalition's charges of discrimination. Similarly, U S WEST's voluntary inclusion of unaffiliated ISPs in its modem giveaways and other promotions demonstrates its concern for the ISPs' competitiveness, contrary to the assertions in these groups' comments.

substantial commitments reflect U S WEST's belief that its relationship with independent ISPs is symbiotic; both U S WEST and ISPs will thrive if they work together. Where advanced services are rolled out by cable providers, by contrast, there is often no role at all for independent ISPs, because the provider of a cable modem generally allows no unaffiliated ISPs to offer service through that high-speed pipe. U S WEST continues to be willing to modify its safeguards and procedures if ISPs raise new legitimate concerns.

2. Provisioning

Finally, U S WEST takes several measures in provisioning MegaSubscriber to ensure that a customer's choice of ISP is honored. After !nterprise receives a MegaSubscriber order from its sales channel, it transfers control of that order out of sales for processing. When an !nterprise representative calls the subscriber to schedule installation, the representative confirms the ISP choice and ensures that the order form contains the proper notation. In addition, the installation technician verifies the customer's ISP selection a second time before installing MegaSubscriber. Unaffiliated ISPs have been informed of these procedures and have acknowledged their satisfaction.

U S WEST adopted these detailed checks after complaints arose in Minnesota that some customers had been mistakenly directed to USWEST.net.[33/] U S WEST investigated the alleged errors and determined that two order takers in fact had copied "USWEST.net" onto blank order forms where the customer's ISP selection is indicated. U S WEST promptly corrected the erroneous designations and appropriately disciplined the two responsible individuals. Notably, the MegaSubscriber customers whose ISP selections were

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33/ *See* Retail ISPs at Attached Complaint ¶ 45.

initially disregarded were not prevented from connecting with their ISP of choice through a dial-up connection; rather, they were temporarily unable to access that ISP only through the MegaSubscriber service. Nevertheless, U S WEST took the complaints very seriously and adopted the above-described procedures to ensure that they will not be repeated.

C. Procedures Permitting ISPs To Obtain Facilities from Other Carriers

Initially, MegaBit Services were designed and deployed as an end-to-end product offering from U S WEST. As a result, the associated systems — testing, monitoring, reporting, and the like — were not engineered to allow for the presence of another carrier. Nor were the added costs associated with having multiple carriers provide the needed facilities and functions factored into the rates for MegaCentral or MegaSubscriber services. Moreover, with end-to-end provisioning over U S WEST-provided facilities, U S WEST retained the ability to troubleshoot, often in advance of a customer complaint, and therefore avert service breakdowns. If trouble was reported, U S WEST could examine the entire circuit, and easily isolate and repair the problem.

Permitting a competing carrier to supply the access link into the ATM switch thus presents several costs and complications. Despite U S WEST's concerns that permitting a CLEC to provide this access link might decrease service quality and increase customer costs, the company nevertheless has indicated its willingness to amend tariffs where necessary to make MegaCentral available other than as an end-to-end service in order to accommodate some of its ISP customers.[34/] In fact, the Company is currently developing

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34/ The Utah Coalition avoids mention of this fact, erroneously asserting that U S WEST persists in preventing CLECs from providing data transport services. *See* Utah Coalition at 1-2.

procedures and conducting appropriate cost studies in order to accomplish these amendments. As soon as the additional costs (if any) are quantified, U S WEST will file the necessary amendments to the tariffs to formalize this new option. In the meantime, the Company is working to enable customers in GTE's territory to subscribe to MegaCentral through a "meet point" arrangement and has expressed its willingness to work with any CLEC that wishes to provide the MegaCentral access link.

Certificate of Service

I certify that a copy of the foregoing Reply Comments of US West Communications, Inc. has been served upon the following parties either by hand delivery or by first class U.S. mail, postage prepaid this 8th day of October, 1998.

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CERTIFICATE OF SERVICE

I, Kristi Jones, do hereby certify that I have caused 1) the forgoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be filed electronically with the FCC by using its Electronic Comment Filing System, 2) two hard copies and one diskette copy (with cover letter) of the **COMMENTS** to be served, via hand delivery, upon the person (marked with an asterisk) listed on the attached service, and 3) a courtesy copy of the **COMMENTS** to be served, via hand delivery, upon all other persons listed on the attached service list.

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